No. 94-514-CFY
Status: GRANTED

Title: United States, Petitioner
v.
Michael E. Gaudin

Docketed:
September 19, 1994

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Hansen,Richard

Entry	Date	Note	Proceedings and Orders
1	Sep 19 1994	G	Petition for writ of certiorari filed.
6	Oct 21 1994	G	Motion of respondent for leave to proceed further herein in forma pauperis filed.
4	Nov 23 1994		Reply brief of petitioner United States filed.
3	Nov 30 1994		DISTRIBUTED. January 6, 1995 (Page 1)
5	Jan 6 1995		Petition GRANTED. limited to Question 1 presented by the petition.
			**********
7	Jan 17 1995		DISTRIBUTED. February 17, 1995 (Page 18)
8	Jan 23 1995		Motion of respondent for leave to proceed further herein in forma pauperis GRANTED.
9	Feb 2 1995		SET FOR ARGUMENT MONDAY, APRIL 17, 1995. (4TH CASE).
10	Feb 16 1995		Brief amicus curiae of Criminal Legal Justice Foundation filed.
11	Feb 21 1995		Joint appendix filed.
12	Feb 21 1995		Brief of petitioner United States filed.
13	Feb 21 1995		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Ninth Circuit.
14	Feb 22 1995		Record filed.
		*	Original record proceedings United States District Court for the District of Montana (2 BOXES)
15	Feb 24 1995		Record filed.
		*	Additional record proceedings United States District Court for the District of Montana (SEALED BOX)
16	Mar 3 1995		CIRCULATED.
17	Mar 22 1995	X	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
18	Mar 28 1995	X	Brief of respondent Michael E. Gaudin filed.
19	Apr 10 1995	X	Reply brief of petitioner filed.
20	Apr 17 1995		ARGUED.

Supreme Court, U.S.
FILED

(1) 94 514 SEP 19 1994

No. OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL E. GAUDIN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DREW S. DAYS, III
Solicitor General
JO ANN HARRIS
Assistant Attorney General
WILLIAM C. BRYSON
Deputy Solicitor General
MICHAEL R. DREEBEN
Assistant to the Solicitor General
KATHLEEN A. FELTON
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

80 pp

QUESTION PRESENTED

Whether, in a prosecution under 18 U.S.C. 1001 for making false statements in a matter within the jurisdiction of a federal agency, the materiality of those statements is an issue to be resolved by the court rather than the jury.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provision involved	2
Statement	2
Reasons for granting the petition	7
Conclusion	13
Appendix A	1a
Appendix B	51a

TABLE OF AUTHORITIES

Cases:

Braden v. *United States*, 365 U.S. 431 (1961)	10
Bryson v. *United States*, 396 U.S. 64 (1969)	12
Cabana v. *Bullock*, 474 U.S. 376 (1986)	5
Freidus v. *United States*, 223 F.3d 598 (D.C. Cir. 1955)	8
Kungys v. *United States*, 485 U.S. 759 (1988)	6, 8, 11
Russell v. *United States*, 369 U.S. 749 (1962)	10
Sinclair v. *United States*, 279 U.S. 263 (1929)	5, 10, 11
Sullivan v. *Louisiana*, 113 S. Ct. 2078 (1993)	5, 12
United States v. *Abadi*, 706 F.2d 178 (6th Cir.), cert. denied, 464 U.S. 821 (1983)	9, 11
United States v. *Arch Trading Co.*, 987 F.2d 1087 (4th Cir. 1993)	9
United States v. *Bramblett*, 348 U.S. 503 (1955)	12
United States v. *Corsino*, 812 F.2d 26 (1st Cir. 1987)	8, 9
United States v. *Daily*, 921 F.2d 994 (10th Cir. 1990), cert. denied, 112 S. Ct. 405 (1991)	9, 11
United States v. *Elkin*, 731 F.2d 1005 (2d Cir.), cert. denied, 469 U.S. 822 (1984)	8
United States v. *Gilliland*, 312 U.S. 86 (1941)	12

Cases—Continued: Page

United States v. *Greber*, 760 F.2d 68 (3d Cir.), cert. denied, 474 U.S. 988 (1985) 9, 11
United States v. *Gribben*, 984 F.2d 47 (2d Cir. 1993) 9, 10-11
United States v. *Hansen*, 772 F.2d 940 (D.C. Cir. 1985), cert. denied, 475 U.S. 1045 (1986) 9
United States v. *Hausmann*, 711 F.2d 615 (5th Cir. 1983) 9
United States v. *Irwin*, 654 F.2d 671 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982) 9
United States v. *Johnson*, 937 F.2d 392 (8th Cir. 1991) 9
United States v. *Jones*, 933 F.2d 807 (10th Cir. 1991) 9
United States v. *Lichenstein*, 610 F.2d 1272 (5th Cir.), cert. denied, 447 U.S. 907 (1980) 8
United States v. *Lopez*, 728 F.2d 1359 (11th Cir.), cert. denied, 469 U.S. 828 (1984) 9
United States v. *Rodgers*, 466 U.S. 475 (1984) 13
United States v. *Martel*, 792 F.2d 630 (7th Cir. 1986) 9
United States v. *Silver*, 235 F.2d 375 (2d Cir.), cert. denied, 352 U.S. 880 (1956) 8
United States v. *Valdez*, 594 F.2d 725 (9th Cir. 1979) 5, 9
United States v. *Yermian*, 468 U.S. 63 (1984) 13
Winship, In re, 397 U.S. 358 (1970) 5, 12

Constitution and statutes:

U.S. Const.:
Amend. V (Due Process Clause) 12
Amend. VI 6, 12
Rev. Stat. § 102 10
2 U.S.C. 192 10

Statutes—Continued:

	Page
8 U.S.C. 1451(a)	11
12 U.S.C. 1709-2	2
18 U.S.C. 1001	*passim*

In the Supreme Court of the United States

OCTOBER TERM, 1994

No.

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL E. GAUDIN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals sitting en banc (App., *infra*, 1a-50a) is reported at 28 F.3d 943. The panel opinion of the court of appeals (App., *infra*, 51a-62a) is reported at 997 F.2d 1267.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 1001, Title 18 of the United States Code, provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

After a jury trial in the United States District Court for the District of Montana, respondent was convicted on one count of equity skimming, in violation of 12 U.S.C. 1709-2, and 43 counts of making false statements, in violation of 18 U.S.C. 1001.[1] He was sentenced to 36 months' imprisonment on the equity skimming count and to concurrent ten-month terms of imprisonment on each of the 43 false statement counts, to be followed by three years' supervised release. He was also fined $2,200. A panel of the court of appeals affirmed respondent's conviction on the equity skimming count, but reversed his convictions on the false statement counts. App., *infra,* 51a-62a. On en banc review, the court once again affirmed the conviction on the equity skimming count and reversed the convictions on the false statement counts. *Id.* at 1a-50a.

---

[1] Of the 45 counts in the indictment charging respondent with false statements under 18 U.S.C. 1001, one was dismissed before the case went to the jury, and another was dismissed at sentencing because of insufficient evidence.

1. Respondent, a real estate broker and developer, purchased and renovated rental housing, and purported to sell that housing to buyers who took out loans insured by the Federal Housing Administration (FHA), an entity within the Department of Housing and Urban Development (HUD). Two aspects of respondent's transactions were fraudulent. First, the appraisals on the housing were inflated, in order to increase the loans obtained from the lending institutions. Second, the buyers had no intention of actually owning the properties. Instead, they were "strawbuyers": friends and relatives of respondent who were recruited to give the appearance of real buyers. Respondent agreed to repurchase the properties from the strawbuyers at a $1,000 profit to them. In addition, he routinely refused the down payments they made. See App., *infra,* 3a. After reacquiring the properties, respondent defaulted on 29 federally insured loans. Respondent made a profit of $982,003 from his scheme. *Id.* at 54a.

The false statements charged in counts 44-46 of the indictment were made on HUD/FHA form 92800-5, which required respondent to certify the appraised value of the property securing the loan. The government's theory was that the statements were false because the appraisals were inflated. The false statements charged in counts 2-17 and 19-42 were made on HUD/FHA form HUD-1, the settlement statement used in closing the sale of the homes from respondent to the strawbuyer.[2] The purpose of form HUD-1 is to show the source and recipient of the funds changing hands at settlement. The HUD-1 form thus requires a statement of the purchase price, the loan amount, and the closing costs to be paid or received by the seller and the buyer (called the "borrower" on the form). At the

---

[2] An example of that form is reproduced as an appendix to the court of appeals' en banc opinion. App., *infra,* 24a-25a.

bottom of the first page of the HUD-1 form, under a caption that says "cash at settlement from or to borrower," line 303 provides boxes to be checked indicating whether the borrower is to pay or receive money and a blank space to indicate how much. App., *infra,* 3a-4a, 24a.

In three of respondent's transactions, the box "to" the borrower was checked; in one transaction, no box was checked; and in the remainder, the box "from" the borrower was checked. Respondent signed a certification that "to the best of my knowledge and belief [the HUD-1 form] is a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction." In all cases, however, the HUD-1 forms were false, because respondent rather than the borrower actually paid or received the cash balances reflected on line 303. Those balances ranged from relatively insignificant amounts to several thousand dollars. App., *infra,* 4a-5a, 25a.

2. The district court instructed the jury that to convict respondent on the false statement counts, the government was required to prove six elements: (1) respondent made or caused to be made a writing that contained a statement concerning a matter within HUD's jurisdiction; (2) the writing contained false, fictitious, and fraudulent statements; (3) respondent knew or should have known that the statement fell within HUD's jurisdiction; (4) respondent knew the writing contained false, fictitious, and fraudulent statements; (5) respondent acted with the intent to influence HUD; and (6) the statements were material to the activities or decisions of HUD. Tr. 2392-2393, 2395, 2399-2400, 2402. With respect to the sixth element, the court instructed the jury that the statements charged in the indictment were material as a matter of law. App., *infra,* 5a, 58a. Respondent did not object to that instruction. *Id.* at 19a. The jury convicted him of the Section 1001 charges. *Id.* at 2a.

3. A panel of the court of appeals reversed the false statement convictions. App., *infra,* 51a-62a. The court held that, under its prior decision in *United States* v. *Valdez,* 594 F.2d 725, 729 (1979), the issue of materiality in a Section 1001 prosecution must be determined by the jury. App., *infra,* 57a-58a. The court further held that the plain error doctrine did not bar respondent from raising the issue for the first time on appeal, and that the failure to submit the issue of materiality to the jury was not harmless error. *Id.* at 58a-62a.

4. In response to the government's suggestion, the court of appeals granted rehearing en banc. 5 F.3d 374 (1993). In a 6-5 ruling, the en banc court reaffirmed its holding that materiality under Section 1001 is an issue to be decided by the jury. App., *infra,* 1a-25a.

a. The majority noted that most courts have ruled that materiality under perjury and false statement statutes is a question of law for determination by the judge. App., *infra,* 5a. In so holding, the court observed, those courts have generally relied on *Sinclair* v. *United States,* 279 U.S. 263 (1929), which held that, in a prosecution for failing to answer a question "pertinent to the question under inquiry [by Congress]," the issue of pertinency is analogous to the issue of relevancy and is therefore a legal issue for determination by the court. The court of appeals concluded, however, that *Sinclair* does not compel the view that materiality in a Section 1001 prosecution is an issue for the court, because more recent decisions establish that the Constitution entitles a defendant to a jury determination, beyond a reasonable doubt, of the facts required to establish the elements of a crime. App., *infra,* 6a-9a, citing, *inter alia, In re Winship,* 397 U.S. 358, 364 (1970); *Cabana* v. *Bullock,* 474 U.S. 376 (1986); and *Sullivan* v. *Louisiana,* 113 S. Ct. 2078 (1993). The court concluded that the proper decisionmaker on the issue of materiality must be

determined in light of those constitutional considerations. App., *infra,* 9a-14a.

The court held that materiality is "an essential element of the offense prohibited by 18 U.S.C. § 1001," because the statute itself makes materiality an element of the crime. App., *infra,* 11a. The court further held that, under the prevailing test for materiality—whether a statement "has a natural tendency to influence, or was capable of influencing, the decision of the decisionmaking body to which it was addressed" (*Kungys* v. *United States,* 485 U.S. 759, 770 (1988))—"[i]t would seem that a factual inquiry would nearly always be necessary to determine what makes a difference to the decisionmaking body." App., *infra,* 12a.

While statutes or regulations could define what is material, the court believed that in the usual case, materiality is a "mixed question of law and fact." App., *infra,* 12a. The court stated for example, that there were factual issues as to the materiality to the FHA of the misstatements on respondent's settlement forms. The court also suggested that there would be factual issues about the materiality of a statement in a typical perjury case based on false testimony in a court proceeding or grand jury investigation. *Id.* at 12a-14a. The court concluded that if materiality is a mixed question of law and fact under Section 1001, the Sixth Amendment requires that it "be submitted to the jury." *Id.* at 13a-14a. The court added that, "[a]lthough we are confronted in this case with only the issue of whether materiality must be submitted to the jury in section 1001 cases, it seems to be courting constitutional error to withdraw the materiality question from the jury in other perjury and false statement cases." *Id.* at 14a.

The court of appeals recognized that this Court held in *Kungys* that materiality is a question of law to be resolved by the court, and that *Kungys* had relied on Section 1001

cases in so holding. But the court distinguished *Kungys* as a denaturalization case, not a criminal case. According to the court of appeals, *Kungys* therefore did not have to address the constitutional problem raised under *Winship* of allowing a court to determine an element of the crime as a matter of law. App., *infra,* 14a-17a.

Finally, the court concluded that the error of failing to submit the issue of materiality to the jury is neither harmless nor barred from appellate review in this case by the plain error doctrine. App., *infra,* 18a-22a.

b. Judge Kozinski, writing for himself and four other judges, dissented. App., *infra,* 26a-50a. He noted that by holding that materiality is an issue for the jury in a prosecution under Section 1001, the court had "provoke[d] a conflict with every other regional circuit." *Id.* at 26a. He also criticized the majority for departing from the Court's holdings in *Sinclair* and *Kungys,* and suggested that the majority's holding unsettles Ninth Circuit law under perjury and other false statement statutes. *Id.* at 27a-39a. Finally, he explained that the majority had misinterpreted Section 1001 in holding that the issue of materiality depends on what facts actually would be considered by a decisionmaking body.[3] *Id.* at 40a-53a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's holding—that the issue of materiality in a prosecution under 18 U.S.C. 1001 must be resolved by the jury, rather than by the court—conflicts with the decision of every other court of appeals that has addressed the issue. In addition, the court of appeals' conclusion is in considerable tension with this Court's holdings, under

[3] Judge Kozinski also disagreed with the majority that the error in this case met the requirements of the plain error doctrine. App., *infra,* 26a-50a.

analogous statutes, that the question whether a false statement is material is an issue to be resolved by the court as a matter of law. Because the allocation of responsibility for determining materiality has significant practical consequences for prosecutions under an important federal statute, this Court's review is warranted.

1. Section 1001 prohibits knowingly and willfully concealing or covering up a material fact or making a false statement in any matter within the jurisdiction of a federal agency. 18 U.S.C. 1001. As this Court has observed, the "most common formulation" for expressing the concept of materiality is that a "concealment or misrepresentation is material if it has a natural tendency to influence, or was capable of influencing, the decision of the decisionmaking body to which it was addressed." *Kungys* v. *United States,* 485 U.S. 759, 770 (1988). The Ninth Circuit's rule that the issue of materiality in a Section 1001 case must be submitted to the jury is unique among the circuits.[4]

---

[4] Section 1001 has an express materiality requirement in its first clause, the cover-up clause. "While materiality is not an explicit requirement of the second, false statement, clause of § 1001, courts have inferred" a materiality requirement in that clause as well. *United States* v. *Corsino,* 812 F.2d 26, 30 (1st Cir. 1987), quoting *United States* v. *Lichenstein,* 610 F.2d 1272, 1278 (5th Cir.), cert. denied, 447 U.S. 907 (1980); *Freidus* v. *United States,* 223 F.2d 598, 601 (D.C. Cir. 1955) ("The legislative purpose strongly implies that only material false statements were contemplated, *i.e.,* statements that could affect or influence the exercise of a governmental function."); App., *infra,* 11a-12a. The Second Circuit, in contrast to other circuits, does not consider materiality to be an element of the false-statement offense created by the second clause of Section 1001, see *United States* v. *Elkin,* 731 F.2d 1005, 1009, cert. denied, 469 U.S. 822 (1984); *United States* v. *Silver,* 235 F.2d 375, 377-378, cert. denied, 352 U.S. 880 (1956), but it has held that the materiality of a fact under the cover-up clause of Section 1001 is determined by the court. *Elkin,* 731 F.2d at 1009.

The court of appeals acknowledged that "most other circuits have held that the determination of materiality in criminal perjury and false statement statutes is a question of law for determination by the judge." App., *infra*, 5a. In fact, every other regional court of appeals has treated materiality in a Section 1001 case as an issue of law to be determined by the court, not the jury. See *United States* v. *Corsino*, 812 F.2d 26, 31 n.3 (1st Cir. 1987); *United States* v. *Gribben*, 984 F.2d 47, 50-51 (2d Cir. 1993); *United States* v. *Greber*, 760 F.2d 68, 73 (3d Cir.), cert. denied, 474 U.S. 988 (1985); *United States* v. *Arch Trading Co.*, 987 F.2d 1087, 1095 (4th Cir. 1993); *United States* v. *Hausmann*, 711 F.2d 615, 616 (5th Cir. 1983); *United States* v. *Abadi*, 706 F.2d 178, 180 (6th Cir.), cert. denied, 464 U.S. 821 (1983); *United States* v. *Martel*, 792 F.2d 630, 637 (7th Cir. 1986); *United States* v. *Johnson*, 937 F.2d 392, 396 (8th Cir. 1991); *United States* v. *Jones*, 933 F.2d 807, 811-812 (10th Cir. 1991); *United States* v. *Lopez*, 728 F.2d 1359, 1362 n.4 (11th Cir.), cert. denied, 469 U.S. 828 (1984); *United States* v. *Hansen*, 772 F.2d 940, 950-951 (D.C. Cir. 1985) (Scalia, J.), cert. denied, 475 U.S. 1045 (1986).

There is no likelihood that further consideration of the issue in the lower courts will eliminate the conflict. The Ninth Circuit first announced its rule that the jury must determine the issue of materiality in a Section 1001 prosecution in *United States* v. *Valdez*, 594 F.2d 725, 729 (1979). In the ensuing years, other circuits have not been persuaded by that approach. The Tenth Circuit, which at one time took the same position as the Ninth Circuit, see *United States* v. *Irwin*, 654 F.2d 671, 677 n.8 (1981), cert. denied, 455 U.S. 1016 (1982), has since rejected that view and has squarely held that "materiality under § 1001 is a question of law for the court." *United States* v. *Daily*, 921 F.2d 994, 1004 (10th Cir. 1990), cert. denied, 112 S. Ct. 405 (1991). In light of the Ninth Circuit's adherence to its aberrant position in an

en banc decision, this Court's intervention is required to furnish a uniform national rule.

2. It is not surprising that the overwhelming majority of the courts of appeals have concluded that materiality under Section 1001 is an issue for resolution by the court. The principles requiring that result stem directly from this Court's decision in *Sinclair* v. *United States,* 279 U.S. 263 (1929).

In *Sinclair,* the defendant was charged under Rev. Stat. § 102 (2 U.S.C. 192) for refusing to answer "any question pertinent to the question under inquiry" by a congressional committee. 279 U.S. at 284-285. This Court held that "[t]he question of pertinency under § 102 was rightly decided by the court as one of law." *Id.* at 298. The Court noted that pertinency "may be likened to [questions] concerning relevancy," which are resolved as a matter of law. *Ibid.* The Court also noted that the issue of pertinency "is not essentially different from the question as to materiality of false testimony charged as perjury," and that "the materiality of what is falsely sworn, when an element in the crime of perjury, is one for the court." *Ibid.* The Court therefore concluded that it "would be incongruous and contrary to well-established principles to leave the determination of * * * [pertinency] to a jury." *Id.* at 299.[5] As many courts have held, the same principles apply to the issue of materiality under Section 1001. See, *e.g., United*

---

[5] In two later cases involving prosecutions under the same statute, the Court reaffirmed *Sinclair*'s rule that "the question of pertinency is one for determination by the court as a matter of law." *Russell* v. *United States,* 369 U.S. 749, 755-756 (1962); see *Braden* v. *United States,* 365 U.S. 431, 436 (1961) ("At the trial the district judge determined as a matter of law that the questions were pertinent to a matter under inquiry by the subcommittee, leaving to the jury the question whether the pertinence of the questions had been brought home to the petitioner.").

States v. *Gribben*, 984 F.2d at 50; *United States* v. *Greber*, 760 F.2d at 73; *United States* v. *Daily*, 921 F.2d at 1006.

In *Kungys* v. *United States*, 485 U.S. 759 (1988), this Court reaffirmed that materiality is a legal issue to be decided by the court. That case involved 8 U.S.C. 1451(a), which provides for the denaturalization of persons who conceal "material facts" from the government in applying for citizenship. In addressing the question "whether materiality under § 1451(a) is an issue of law, which we may decide for ourselves, or one of fact, which must be decided by the trial court," the Court relied on interpretations of "the materiality requirement under other statutes dealing with misrepresentations to public officers." 485 U.S. at 772. "[S]ee[ing] no reason not to follow what has been done" under those statutes, the Court concluded that materiality under Section 1451(a) is a question of law. *Ibid.*

In so holding, the Court quoted with approval *Sinclair*'s statement that "[t]he materiality of what is falsely sworn, when an element in the crime of perjury, is one for the court." *Kungys*, 485 U.S. at 772 (quoting *Sinclair*, 279 U.S. at 298). The Court also quoted the Sixth Circuit's reasoning "in a case involving 18 U.S.C. § 1001":

> [A]lthough the materiality of a statement rests upon a factual evidentiary showing, the ultimate finding of materiality turns on an interpretation of substantive law. Since it is the court's responsibility to interpret the substantive law, we believe [it is proper to treat] the issue of materiality as a legal question.

Ibid. (brackets added by Court) (quoting *United States* v. *Abadi*, 706 F.2d at 180). The analysis in *Kungys* makes clear that the materiality of a concealed or misrepresented fact under Section 1001 is an issue of law for the court.

The court of appeals reasoned that *Sinclair* is not dispositive, because it preceded more recent decisions that construe the Sixth Amendment's jury trial guarantee and the Due Process Clause to "require that the facts essential to establish the elements of a crime must be decided by a jury" beyond a reasonable doubt. App., *infra,* 6a. See *In re Winship,* 397 U.S. 358, 363-364 (1970); *Sullivan* v. *Louisiana,* 113 S. Ct. 2078 (1993). The court of appeals also found *Kungys* inapplicable because it involved a civil denaturalization proceeding, in which those constitutional requirements do not apply. App., *infra,* 14a-17a. As the dissenting opinion pointed out, however, the conclusion that materiality is an issue of law does not turn on the civil or criminal form of the proceeding.

> Something is either a question of law or a question of fact; it can't be both. Once it is held to be a question of law—as materiality was in *Kungys*—certain consequences follow. One is that the standard of review is de novo rather than for substantial evidence. Another is that, in a criminal case, it need not be decided by a jury.

Id. at 28a-29a (Kozinski, J., dissenting). Accordingly, the holdings in cases such as *Winship* and *Sullivan* are inapplicable here; those cases do not suggest that questions of law, such as the issue of materiality, are to be determined by the jury.

3. Section 1001 is an important provision of federal criminal law, which is broadly applicable to false statements and concealments within the government's jurisdiction. See, *e.g., United States* v. *Gilliland,* 312 U.S. 86 (1941) (false statements to an executive department); *United States* v. *Bramblett,* 348 U.S. 503 (1955) (false representations to congressional disbursement official); *Bryson* v. *United States,* 396 U.S. 64 (1969) (false state-

ment to an independent agency). The determination of whether the judge or the jury should resolve the question of materiality affects every prosecution under Section 1001. In addition, as the dissent in the court of appeals noted, a wide variety of other federal criminal provisions contain materiality requirements, and the reasoning of the opinion below may well extend to those provisions. See App., *infra,* 35a-39a & nn.3-4 (Kozinski, J., dissenting) (listing 43 statutes having express materiality requirements and 54 that apparently have implied materiality requirements).

This Court has previously granted review to resolve conflicts in the courts of appeals over the interpretation of Section 1001. *United States* v. *Yermian,* 468 U.S. 63, 67-68 (1984) (whether defendant must know of federal agency jurisdiction); *United States* v. *Rodgers,* 466 U.S. 475, 478-479 (1984) (scope of federal agency "jurisdiction"). The same course is warranted here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

MICHAEL R. DREEBEN
Assistant to the Solicitor General

KATHLEEN A. FELTON
Attorney

SEPTEMBER 1994

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 90-30334
D.C. No. CR-89-0034-PGH-1

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MICHAEL E. GAUDIN, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the District of Montana
Paul G. Hatfield, District Judge, Presiding

Argued and Submitted November 18, 1993
San Francisco, California
Filed June 21, 1994

OPINION

Before: WALLACE, Chief Judge, HUG, TANG, FLETCHER, REINHARDT, BEEZER, KOZINSKI, LEAVY, RYMER, T.G. NELSON, and KLEINFELD, Circuit Judges.

Opinion by Judge HUG; Dissent by Judge KOZINSKI

HUG, Circuit Judge:

We granted rehearing en banc in *United States v. Gaudin*, 997 F.2d 1267 (9th Cir.), *rehearing granted*, 5 F.3d 374 (1993), to decide whether the element of materiality in 18 U.S.C. § 1001 is a question of fact that must be determined by the jury. We hold that it is.

Michael E. Gaudin was convicted of one count of equity skimming in violation of 12 U.S.C. § 1709-2 for failing to pay United States Housing & Urban Development/Federal Housing Administration ("HUD/FHA") insured loans, and 43 counts of making false statements on loan documents in violation of 18 U.S.C. § 1001. A panel of this court affirmed the equity skimming conviction but reversed the false statements convictions because the district court failed to submit the element of materiality to the jury. *United States v. Gaudin*, 997 F.2d 1267, 1273 (9th Cir. 1993).

The Government's petition for rehearing requested that we reconsider our circuit precedent holding that materiality is an element of the offenses charged under 18 U.S.C. § 1001 that must be submitted to the jury. We affirm the opinion of the panel for the reasons therein stated. In this opinion, we discuss in more detail the reasons why we adhere to our authority that the element of materiality must be submitted to the jury.

I.

A more comprehensive statement of the facts of this case concerning all charges is set forth in the panel opinion. The facts relevant to the issue discussed in this opinion are set forth as follows.

Gaudin became involved in purchasing and renovating rental housing during the recession of 1981-82 when demand for real estate diminished. He purchased many government repossessions, which he held in his or his company's name, and renovated them to rent or resell. Gaudin solicited friends and relatives to buy the houses from him on terms he arranged using FHA-secured loans. He guaranteed he would repurchase the house at a $1,000 profit, if they chose to sell it. In most instances, they did sell the house back to Gaudin for the $1,000 profit. In some instances, the buyer put up a cash down payment, but in most instances, the buyer deeded a percentage interest in the equity in his or her own home as the down payment.

Gaudin made all the necessary arrangements for each loan, including obtaining an appraisal of the refurbished house. Each loan was designed with the lender as an FHA-insured loan. Thus, HUD/FHA forms were utilized in the sales and loan transactions.

The Government contended that Gaudin misled the FHA because the buyers of these houses were not legitimate buyers, but rather "strawbuyers" who only served as a conduit for Gaudin to obtain the houses for himself with FHA loans. Gaudin was not charged with any crime of fraud or substantive statutory violation for obtaining the FHA loans through "strawbuyers;" instead, he was charged with making material false statements on certain FHA forms that caused the FHA to insure the loans.

Gaudin was convicted on Counts 2-17, 19-42, and 44-46. Counts 44-46 charged that the false statements were made on HUD/FHA form 92800-5, certifying an appraised value of the property securing the loan. The charge in these counts is not complex—it is simply that the amounts of the appraisals were knowingly inflated. Counts 2-17 and 19-42 involved HUD/FHA form HUD-1, which is the

final settlement statement for the closure of the sales transaction. The nature of the charged false statement is more complex in these counts. A copy of the HUD-1 form involved in one of the transactions is shown in Appendix A, and is representative of the HUD-1 forms involved in all of these counts.

The HUD-1 settlement form is the type of form generally used in closing real estate sales transactions. It shows the sales price, the down payment, the loan amount, and the closing costs charged either to the buyer or the seller. The amounts due to and from the buyer and seller are tallied, and a balance is either due to or from the buyer. On these HUD/FHA forms, the buyer is designated as the "borrower" and the balance is shown on line 303 of the borrower's side of the form with a block to check showing that cash is either due "to" or "from" the borrower. In three of the transactions, this balance was due "to" the borrower and the appropriate block was checked. In another, neither block was checked. In the remaining transactions, the balance was due "from" the buyer. It is significant that the only possible blocks to be checked are cash "to" or "from" the "borrower." This is mirrored on the seller's side of the form with a block to be checked as to whether the cash was "to" or "from" the "seller."

These balances generally were fairly small—ranging from $31 to several hundred dollars. In a few cases, where no equity transfer or cash down payment was made, the amounts were several thousand dollars. The certification that the buyer and seller signed at the bottom of the second page of the form states, "I have carefully reviewed the HUD-1 Settlement Statement and to the best of my knowledge and belief it is a true and accurate statement of all receipts and disbursements made *on my account or by me* in this transaction." (Emphasis added.)

It is true that Gaudin, not the buyer, either paid or received these cash balances, but a genuine factual question arises as to how significant who paid or received the balance could be to the FHA. It appears quite doubtful from the format of the form and the certification on the form that it was designed to ferret out situations where the buyer might be serving as a stand-in for the seller or another person and did not intend to keep the house. If so, the form and the certification are very poorly designed to do so. This surely leads to a legitimate factual inquiry as to whether FHA officials pay any attention at all to line 303 of the HUD-1 form in their determination to insure the loan. Obviously, testimony or other evidence would be necessary to show that the block checked on line 303 was of any significance. Testimony was, indeed, taken from FHA officials to establish that factual contention.

The question then becomes whether the judge determines this factual component of the materiality issue or whether this is a factual matter that must be determined by the jury.

II.

We recognize that most other circuits have held that the determination of materiality in criminal perjury and false statement statutes is a question of law for determination by the judge. In our circuit, we have held that the issue of materiality in most of these statutes is a question of law for the judge. The exception has been section 1001 cases, in which we have held that it is an element of the crime that must be determined by the jury. *United States v. Valdez*, 594 F.2d 725, 728-29 (9th Cir. 1979). On the basis of *Valdez*, we reversed Gaudin's convictions on Counts 2-17, 19-42, and 44-46 because the district court removed the issue from the jury, instructing that the Government had established materiality as a matter of law.

The opinions holding that the issue of materiality in these criminal cases is a matter of law for the court to decide have relied on the 1929 Supreme Court case of *Sinclair v. United States,* 279 U.S. 263 (1929), which involved a congressional investigation into the Teapot Dome Scandal. The defendant was charged with a violation of 18 U.S.C. § 192 for failing to answer a question that was "pertinent to the question under inquiry." The Court held that the issue of pertinency was akin to determining relevance in the admission of evidence in a trial and therefore was a matter of law reserved for the court. *Id.* at 298.

The essential issue before us is whether the opinions relying on *Sinclair* survive the more recent holdings of the Supreme Court that the Sixth Amendment and the Due Process Clause require that the facts essential to establish the elements of a crime must be decided by a jury.

III.

In the oft-quoted opinion of *In re Winship,* 397 U.S. 358, 364 (1970), the Supreme Court stated:

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof [to a proper factfinder] beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

The application of this imperative has been developed in later Supreme Court opinions. *See, e.g., Sandstrom v. Montana,* 442 U.S. 510, 520-21 (1979); *Cabana v. Bullock,* 474 U.S. 376, 384-85 (1986); *Carella v. California,* 491 U.S. 263, 268-69 (1989) (Scalia, J., concurring); *Yates v. Evatt,* 500 U.S. ____, ____, 111 S. Ct. 1884, 1891

(1991); *Sullivan v. Louisiana,* 113 S. Ct. 2078, 2082 (1993). It is clear from this authority that under the Sixth Amendment the proper factfinder in serious criminal offenses is the jury. The Court in *Cabana* stated:

> A defendant charged with a serious crime has the right to have a jury determine his guilt or innocence, and a jury's verdict cannot stand if the instructions provided the jury do not require it to find each element of the crime under the proper standard of proof, *Sandstrom v. Montana,* 442 U.S. 510 (1979). Findings made by a judge cannot cure deficiencies in the jury's finding as to the guilt or innocence of a defendant resulting from the court's failure to instruct it to find an element of the crime.

Cabana, 474 U.S. at 384-85 (citation omitted).

In *Sullivan,* the Court summarized its prior holdings concerning the Sixth Amendment and Due Process requirements of what must be decided by a jury in criminal cases. The Court stated:

> The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." In *Duncan v. Louisiana,* 391 U.S. 145, 149 (1968), we found this right to trial by jury in serious criminal cases to be "fundamental to the American scheme of justice," and therefore applicable in state proceedings. The right includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of "guilty." Thus, although a judge may direct a verdict for the defendant if the evidence is legIly insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence.

> What the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause. The prosecution bears the burden of proving all elements of the offense charged, and must persuade the factfinder "beyond a reasonable doubt" of the facts necessary to establish each of those elements.

Sullivan, 113 S. Ct. at 2080-81 (citations omitted).[1]

With the quoted summary in the recent *Sullivan* case, it is clear that the jury must decide "the facts necessary to establish each [element of the crime]." As Justice Scalia has noted in his concurrence in *Carella*, the jury's factfinding function is a structural matter that the Constitution guarantees.

> The constitutional right to a jury trial embodies "a profound judgment about the way in which law should be enforced and justice administered." It is a structural guarantee that "reflect[s] a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." A defendant may assuredly insist upon observance of this guarantee even when the evidence against him is so overwhelming as to establish guilt beyond a reasonable doubt. That is why the Court has found it constitutionally impermissible for a judge to direct a verdict for the State.

---

[1] We note in the above quotations that there is a difference in expressing the point in *Cabana* and *Sullivan*. The Court in *Cabana* speaks of the necessity of the jury deciding *all elements* of the crime, whereas the Court in *Sullivan* speaks of the necessity of the jury deciding the *facts necessary* to establish all elements of the crime. *Cabana* relied on *Sandstrom*, which in quoting *Winship* emphasized that it was "*every fact* necessary to constitute the crime" that must be decided by the jury. *Winship*, 397 U.S. at 364; *Cabana*, 474 U.S. at 384. It is apparent no difference in meaning is intended. *Cabana* uses a shorthand way of referring to the *Winship* quotation.

Carella, 491 U.S. at 268 (citations omitted).

Most of the recent circuit opinions continue to hold that the issue of materiality in these cases is a question of law for the court, relying on *Sinclair,* without discussing the impact of the more recent line of authority following *Winship.* In a very thorough and thoughtful opinion, *United States v. Taylor,* 693 F. Supp. 828, 830-47 (N.D. Cal. 1988), Judge Lynch questioned the continued vitality of this authority. He noted that the courts after *Sinclair* have accepted as a matter of rote that materiality is a question of law, without considering the effect of the *Winship* line of authority.

In the Seventh Circuit case of *United States v. Staniforth,* 971 F.2d 1355, 1358 (7th Cir. 1992), Judge Posner noted that the holding that materiality is a question of law "is more than a little puzzling," because a criminal defendant is entitled to require the prosecutor to prove to the jury's satisfaction every element of the offense. The opinion went on to note that a factual basis is required to prove the element. The court did not decide the issue, however, because it was not raised on appeal.

Several state court decisions have reached the conclusion that the issue of materiality is for the jury to decide. The Supreme Courts of Massachusetts, New Jersey, and California have so held. *See Commonwealth v. McDuffee,* 398 N.E.2d 463, 469-70 (Mass. 1979); *New Jersey v. Anderson,* 603 A.2d 928 (N.J. 1992); and *People v. Hedgecock,* 795 P.2d 1260 (Cal. 1990).[2]

---

[2] The dissent speculates at length on the prospect that this decision could have serious effects on the finality of prior convictions. Initially, one must question whether this is an appropriate consideration at all. It would be hard to justify continuing to deprive defendants of their Fourth and Sixth Amendment rights on the ground that to do

The Government argues that this question has now been put to rest by the Supreme Court in *Kungys v. United States*, 485 U.S. 759 (1988), which the Government contends confirms that the issue of materiality is a matter of law in criminal false statement cases. We disagree. We find it difficult to believe that the Supreme Court sought to resolve this significant constitutional issue in criminal cases by statements concerning its standard of review of a judge's decision in a civil case, without mention of the constitutional implications. We discuss the matter further in Part VI.

IV.

We now turn to consider whether materiality is an element of the crime charged in this case. The false statement charges were brought under 18 U.S.C. § 1001, which provides:

---

otherwise would cast doubt on prior convictions. However, even addressing this consideration, we note that this decision only affirms our prior authority that materiality is a question of fact for the jury in prosecutions under 18 U.S.C. § 1001, which has been the law in this circuit for 15 years. Thus, this opinion could have no effect on prior convictions under section 1001.

The application of this opinion to future prosecutions under other statutes is a matter to be considered as those cases arise. It is sheer speculation to forecast dire consequences from petitions for collateral relief that conceivably could upset prior convictions under other statutes. This requires an assumption as to how this holding will be applied to other statutes, that such holdings will be applied retroactively for collateral relief, and that limitations on collateral relief, such as procedural bar and *Teague v. Lane*, 489 U.S. 288 (1989), could be overcome. This speculation about collateral consequences, built on multiple assumptions, obscures the real point – whether a defendant is entitled under the Fourth and Sixth Amendments to have a jury decide the facts necessary to establish an element of the crime with which he is charged.

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a *material fact,* or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1001 (emphasis added).

We first held that materiality is an essential element of the offense prohibited by 18 U.S.C. § 1001 in *Paritem Singh Poonian v. United States,* 294 F.2d 74, 75 (9th Cir. 1961). *See also United States v. Talkington,* 589 F.2d 415, 416 (9th Cir. 1978); *United States v. Deep,* 497 F.2d 1316, 1321 (9th Cir. 1974). In *Valdez,* we clarified that the materiality element is a question of fact to be determined by the jury. *Valdez,* 594 F.2d at 729. There appears to be scant authority to the contrary.

When a statute expressly provides for materiality as an element of the crime, it can hardly be said that it is not an element. *McMillan v. Pennsylvania,* 477 U.S. 79, 85 (1986) (holding that the legislature's definition of an offense is usually dispositive). If, in construing the intent of Congress, the courts determine that materiality was intended by Congress to be an element of the crime, a similar result would seem apparent.

The first clause of section 1001 expressly states that the falsification or concealment must be of a material fact. The second and third clauses do not contain the express reference to a material fact. Our circuit and most other circuits have construed the intent of Congress to be that the element of materiality applies to all three clauses. It can be

seen that the clauses are so closely related that this is the only reasonable construction of congressional intent. The means by which a person "falsifies, conceals or covers up" a material fact would be by "false fictitious or fraudulent statements" or by a "false writing or document." It is difficult to conceive of a "trick, scheme or device" to accomplish the falsification or concealment that would not involve such a statement or document. We thus conclude that our prior construction of the statute is sound and that materiality is an element of the crime of all charges under section 1001.

V.

Because materiality is an element of the crime, can it be determined as a matter of law? Conceivably, this could be justified if the determination had no factual component at all. The Supreme Court in the *Kungys* opinion states that the customary common law test of materiality in false statement statutes is whether the statement " 'has a natural tendency to influence, or was capable of influencing, the decision' of the decisionmaking body to which it was addressed." *Kungys,* 485 U.S. at 770. It would seem that a factual inquiry would nearly always be necessary to determine what makes a difference to the decisionmaking body. Perhaps if what is material is spelled out in the statutes or in regulations, it would be a pure question of law. However, in most situations, it is a mixed question of law and fact.

Certainly in the section 1001 cases this is true, as is well illustrated in this case. There is no way of knowing the significance to HUD of line 303 of the settlement form without agency testimony.

Even in the perjury cases, it is difficult to say there is no factual component. There is a difference between

relevance from an evidentiary standpoint and materiality as an element of a crime. Where a defendant is prosecuted for perjury committed in a former trial, relevance determines what evidence the jury could have considered, while materiality determines what would have tended to influence its verdict. If the court in the perjury trial concludes that a statement properly was admitted as relevant in the former trial, that is not necessarily equivalent to finding that it would tend to influence the jury. Much evidence may be admitted as relevant, and yet have no influence on the jury's findings regarding the essential elements of the charged crime. The jury in the perjury trial might well find that the relevant evidence could have made no difference to the former jury. Would it not be more faithful to Sixth Amendment requirements to instruct the jury that the statement in question was admissible evidence in the former trial and leave the question to the jury as to whether it could have tended to influence the prior jury?

In any event, the argument that materiality is a pure question of law becomes more attenuated as we move to other circumstances. For example, when the statement is made to a grand jury, there is a necessary factual inquiry as to the nature of the investigation being conducted. Certainly, when the statement is to an agency (as in this case) there is, of necessity, a factual inquiry as to what tends to or is capable of influencing the agency's decision. Justice Scalia in *Kungys* describes such an inquiry as "fact-bound." *Id.* at 773 n.6.

Only if it can be said that there is no factual component to the determination of materiality and, thus, that it is a pure question of law, would the Sixth Amendment constraint not apply. However, if it is a mixed question of law and fact, then it must be submitted to the jury. It would not be faithful to the Sixth Amendment for the judge to

decide the factual component of the element necessary to constitute the crime. In section 1001 cases, it is clear that materiality is a mixed question of law and fact and, thus, must be submitted to the jury.

Although we are confronted in this case with only the issue of whether materiality must be submitted to the jury in section 1001 cases, it seems to be courting constitutional error to withdraw the materiality question from the jury in other perjury and false statement cases because of the difficulty in concluding that there is no factual component for jury determination. Juries are perfectly capable of deciding the question of materiality under appropriate instructions. We frequently submit far more complex questions to juries and have found through the centuries that they do quite well. The Sixth Amendment reflects a conscious judgment of the Framers to interpose a jury between the judge and the accused to determine the facts necessary to find the accused guilty. This is why a judge may not direct a verdict against a defendant no matter how clear the evidence, nor may an appellate court conclude under a harmless error doctrine that a jury "would have" found an essential element of the crime if the jury did not do so under appropriate instructions. *Sullivan,* 113 S.Ct. at 2080, 2082.

VI.

The Supreme Court's decision in *Kungys* does not foreclose the foregoing analysis.

Kungys involved the denaturalization of a citizen, in a civil, non-jury proceeding. The Government charged that there were several material false statements on Kungys' visa application, including his date and place of birth, and sought denaturalization of Kungys on those grounds. The district court held that the false statements on the visa application were not material to the naturalization process

and, thus, could not constitute a basis for denaturalization under 8 U.S.C. § 1451(a). The circuit court of appeals reversed, holding that the false statements concerning date and place of birth were material. The Supreme Court reversed the court of appeals on that issue, but remanded for determination of other issues.

In the process of reviewing the materiality decision, the Court stated that it must first decide whether the determination of the materiality of the false statement of the date and place of birth should be reviewed as a question of law or a question of fact. *Kungys,* 485 U.S. at 772. In effect, the Court was determining the appropriate standard of review of the district court's decision in this civil case. In making this determination, the Court stated:

> [W]e see no reason not to follow what has been done with the materiality requirement under other statutes dealing with misrepresentations to public officers. "[T]he materiality of what is falsely sworn, when an element of the crime of perjury, is one for the court." *Sinclair v. United States,* 279 U.S. 263, 298 (1929). As the Sixth Circuit has said in a case involving 18 U.S.C. § 1001:
>
> > [A]lthough the materiality of a statement rests upon a factual evidentiary showing, the ultimate finding of materiality turns on an interpretation of substantive law. Since it is the court's responsibility to interpret the substantive law, we believe [it is proper to treat] the issue of materiality as a legal question. *United States v. Abadi,* 706 F.2d 178, 180, *cert. denied,* 464 U.S. 821 (1983).

Id. This has been determined by some courts to constitute a conclusion that the 1929 *Sinclair* ruling on materiality in criminal cases survives the analysis of the more recent line

of cases from *Winship* to *Sullivan*. That issue was not before the court in that civil case. We find it inconceivable that the Supreme Court intended to resolve that constitutional question reconciling the *Sinclair* holding with the later pronouncements in *Winship* through *Sullivan* in a civil non-jury case without ever mentioning the *Winship* line of cases.

The Court's very quote from the *Abadi* opinion acknowledges that the materiality of a statement rests upon "a factual evidentiary showing." The *Abadi* opinion offers no explanation of why the judge, rather than the jury, can constitutionally decide this question of fact in a criminal case. The *Abadi* decision mentions *Winship* in a footnote but avoids its implications on the ground that materiality is not an element of the crime defined by 18 U.S.C. § 1001. For the reasons we have explained, we consider this conclusion to be unsound. We note that the Supreme Court did not mention or endorse that conclusion in the footnote.

The Court's opinion in stating the test for determining materiality, that the false statement be one that "has a natural tendency to influence or was capable of influencing, the decision of the decisionmaking body," noted that this involves a factual determination. The opinion states, "[t]his test must be met, of course, by *evidence* that is clear, unequivocal, and convincing." *Kungys,* 485 U.S. at 772 (emphasis added). The judge may be free to evaluate this evidence in order to make that determination in a civil case, but this is not true in a criminal case. Furthermore, in a criminal case, the test must be met by evidence that establishes materiality beyond a reasonable doubt. Justice Scalia also explains the reason for remanding certain of the alleged misrepresentations stating, "it is not our normal practice to consider *fact-bound legal consequences* of contested district court *findings* not yet reviewed by the

court of appeals." *Id.* at 773 n.6 (emphasis added). In a criminal case, *Sullivan* would require that these findings of fact be made by a jury.

VII.

The case before us is an excellent illustration of why materiality under a section 1001 charge is a "fact-bound" inquiry. One cannot look at a particular law or a particular statute or regulation to determine what would affect the decision of the HUD to insure an FHA loan. False statements of age, address, gaps in employment history, or inaccuracies in a financial statement may be of no importance to some agency determinations but crucial to others.

In Gaudin's case, the charges in Counts 2-17 and 19-42 involve merely checking a block on line 303 of a settlement statement that indicated that the borrower, rather than Gaudin, was paying or receiving the balance of the charges on settlement. Some of the amounts written on line 303 were trivial. For example: Count 11, $94.11; Count 12, $122.61; Count 13, $31.07; Count 28, $129.93; Count 31, $91.83. It was necessary to take testimony of department officials in order to determine whether the block checked on line 303 of the settlement statement would tend to influence the agency's decision to insure the loan.

The jury is the finder of fact and is entitled to believe or disbelieve the testimony of the department officials. A persuasive factual argument could be made that there was a reasonable doubt as to whether the particular block checked on line 303 would have tended to influence the agency's decision. That line on the form serves the purpose of tallying the two sides of the settlement form and arriving at a balance. It is not a certification that either party actually paid or received the funds. The actual certification by the parties above their signatures states, "I have

carefully reviewed the HUD-1 Settlement Statement and to the best of my knowledge and belief it is a true and accurate statement of all receipts and disbursements made *on my account or by me* in this transaction." (Emphasis added.) With the certification itself not distinguishing whether the receipts and disbursements were made "by me" or "on my account," this adds credence to an argument that the particular block checked on line 303 would not have any tendency to influence the agency's decision. This is a factual question and the Sixth Amendment and the Due Process Clause require that it be put to a jury to determine this factual issue beyond a reasonable doubt. It is apparent that the argument for materiality is stronger in Counts 44-46 where the statements concern appraisals of market value. The point, however, is that no matter how clear evidence may be, the Sixth Amendment requires that the jury, not the judge, must find the facts necessary to decide this element of the crime beyond a reasonable doubt.

Of course, a judge may rule that a false statement is not material as a matter of law, that is, that the evidence is insufficient for the jury to find that the statement is material. However, when the judge rules that a false statement is material, and withdraws the element of materiality from the jury, the judge deprives the jury of its fact-finding duty and violates the defendant's Due Process and Sixth Amendment rights.

VIII.

We conclude that when the element of materiality requires a factual finding, as it does in section 1001 prosecutions, that element must be submitted to the jury. The district court erred when it instructed the jury that the statements were material as a matter of law. As we dis-

cussed in the panel opinion, *Gaudin*, 997 F.2d at 1271-72, such an error cannot be harmless. *See Sullivan,* 113 S.Ct. at 2081-82; *see also Yates v. Evatt,* 500 U.S. ____, 111 S. Ct. 1884, 1894 (1991); *Martinez v. Borg,* 937 F.2d 422, 424 (9th Cir. 1991). Harmless error analysis focuses on "the basis on which 'the jury actually rested its verdict.' " *Sullivan,* 113 S. Ct. at 2081; *Yates,* 111 S. Ct. at 1893. Under the guidance of *Yates*, we may no longer consider the strength of evidence and determine whether it was so clear that the jury *would have* found the element of a crime to exist, had it been properly instructed, but, instead, we must determine whether the jury was actually able to consider that evidence under the instructions given by the court. When proof of an element has been completely removed from the jury's determination, there can be no inquiry into what evidence the jury considered to establish that element because the jury was precluded from considering whether the element existed at all.

Because Gaudin did not object to the instruction that removed the question of materiality from the jury, we must also determine whether this error was "plain error." In the panel decision, we discussed the relationship between harmless error and plain error, noting that the latter is the more restrictive standard. *See Gaudin,* 997 F.2d at 1271. In discussing plain error, we applied the standard set forth in *United States v. Young,* 470 U.S. 1 (1985), in determining that withdrawing the issue of materiality from the jury was plain error and reversing the convictions on that basis.

The dissent asserts that the more recent case of *United States v. Olano,* 123 L.Ed. 2d 508 requires a different conclusion. We disagree. *Olano* concerned the presence of alternate jurors in the jury room during the jury's deliberations. This was in violation of Federal Rule of Criminal Procedure 24(c). The error was not objected to at the trial

level and was not raised by the defendant on appeal. The court of appeals took notice of the error on its own initiative and reversed. The Supreme Court reversed the decision of the court of appeals on the basis that the error did not affect substantial rights of the defendant because there was no showing that the presence of the alternates affected the verdict and, there was, thus, no showing of prejudice.

In the course of its decision, the Court quoted Federal Rule of Civil Procedure 52(b) and the appropriate standards in applying the Rule as set forth in *Young*. Rule 52(b) provides:

> *PLAIN ERROR.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

The Court, in analyzing the application of Rule 52(b), stated:

> Although a rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with . . . the rules of fundamental justice, the authority created by Rule 52(b) is circumscribed. There must be an error that is plain and that affects substantial rights. Moreover, Rule 52(b) leaves the decision to correct the forfeited error within the sound discretion of the Court of Appeals, and the court should not exercise that discretion unless the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *United States v. Young,* 470 U.S. 1, 15, 84 L. Ed. 2d 1, 105 S.Ct. 1038 (1985) (quoting *United States v. Atkinson,* 297 U.S. 157, 160, 80 L. Ed. 555, 56 S.Ct. 391 (1936)).

Olano, 123 L. Ed. 2d at 518 (internal citations and quotation marks omitted).

There is no doubt in the present case that the error was "plain." It violated clear circuit precedent that had been in existence for 15 years. It also affected Gaudin's substantial constitutional right to have a jury, not a judge, decide the facts necessary to establish the existence of an element of the crime. In *Olano,* the Court was concerned with the possible prejudice from the presence of alternate jurors during deliberations. In this case, we are concerned with a fundamental structural error where the jury was not permitted to render a verdict as to the existence of an element of the crime. Here, our concern is not with a posssible unfair prejudicial impact on the jury's deliberations, but with the failure to allow the jury to deliberate on the issue at all. Gaudin has met his burden to show that error affected substantial rights.

As we have noted, the Court in *Olano* also stated that Rule 52(b) leaves the decision to correct the error within the sound discretion of the court of appeals, to be exercised only when "the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Olano,* 123 L. Ed. 2d at 518. When a defendant has not been accorded his Fourth and Sixth Amendment rights to a jury determination of the existence of an essential element of the crime, we conclude that the error meets that standard. Furthermore, in this case, as we have pointed out elsewhere, there was a serious factual question for the jury as to whether a block checked on line 303 of the HUD-1 Settlement Statement could have a tendency to influence the agency's decision to secure the loan.

Even more importantly, if we were to engage in this fact-finding, as the dissent suggests, we would be substituting our conclusion of what a jury would have

found, not what it did find. This is the very inquiry deemed inappropriate in *Sullivan*. We conclude that there is a sound basis for the exercise of our discretion to correct the plain error raised on appeal.

In conclusion, we confirm our prior authority that the issue of materiality in charges under 18 U.S.C. § 1001 must be submitted to the jury under appropriate instructions. Therefore, in conformity with the panel opinion, the conviction on Count 1, equity skimming, is AFFIRMED. The convictions on Counts 2-17, 19-42, and 44-46 are REVERSED and REMANDED for further proceedings in accordance with the opinions of this court.

ATTACHMENTS TO MAJORITY OPINION

1.a. U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
SETTLEMENT STATEMENT

WESTERN MORTGAGE LOAN CORPORATION dba
UNITED-WESTERN MORTGAGE CORPORATION
2502 BROOKS
MISSOULA, MONTANA 59801

6. TYPE OF LOAN
1. ☒ FHA 2. ☐ FMHA 3. ☐ CONV. UNINS.
4. ☐ VA 5. ☐ CONV. INS.

8. FILE NUMBER: 60333
7. LOAN NUMBER:
8. MORT. INS. CASE NO.: 311-0886388-703

C. NOTE: This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown. Items marked "(p.o.c.)" were paid outside the closing; they are shown here for informational purposes and are not included in the totals.

G. NAME OF BORROWER:
HAWTHORNE, WARREN B.

708 HOMESTEAD
METAIRIE, LOUISIANA 70008

E. NAME OF SELLER:
HALLMARK PROPERTIES, INC.

F. NAME OF LENDER:
WESTERN MORTGAGE LOAN CORPORATION dba UNITED-WESTERN MORTGAGE CORPORATI
2502 BROOKS
MISSOULA, MONTANA 59801

G. PROPERTY LOCATION:
HIGH PINE DRIVE
VICTOR, MONTANA 59875

This is a true copy of the original

H. SETTLEMENT AGENT:
FIRST MONTANA TITLE COMPANY
250 W. MAIN HAMILTON, MT

PLACE OF SETTLEMENT:
250 W. MAIN
HAMILTON, MT

I. SETTLEMENT DATE:
12/09/86
12/12/86

J. SUMMARY OF BORROWER'S TRANSACTION:		K. SUMMARY OF SELLER'S TRANSACTION:	
100. GROSS AMOUNT DUE FROM BORROWER		400. GROSS AMOUNT DUE TO SELLER	
101. Contract sales price	46,000.00	401. Contract sales price	46,000.00
102. Personal property		402. Personal property	
103. Settlement charges to borrower (line 1400)	2,287.77	403. Occupancy Interest Credit	
104.		404. from to at /day	
105.		405.	
Adjustments for items paid by seller in advance		Adjustments for items paid by seller in advance	
106. City/town taxes		406. City/town taxes	
107. County taxes		407. County taxes	
108. Assessments		408. Assessments	
109. Reimburse Seller	148.80	409.	148.80
110.		410.	
111.		411.	
112.		412.	
120. GROSS AMOUNT DUE FROM BORROWER	48,436.57	420. GROSS AMOUNT DUE TO SELLER	46,148.80
200. AMOUNTS PAID BY OR IN BEHALF OF BORROWER		500. REDUCTIONS IN AMOUNT DUE TO SELLER	
201. Deposit or earnest money	86.00	501. Excess deposit (see instructions)	86.00
202. Principal amount of new loan(s)	41,208.00	502. Settlement charges to seller (line 1400)	611.81
203. Existing loan(s) taken subject to		503. Existing loan(s) taken subject to	
204. Deposit with Lender	148.80	504. Payoff of first mortgage loan ICA Morta.	39,000.00
205. Credits from Seller		505. Payoff of second mortgage loan	
206. Overpayment - Rent		506. Held Pending Release of Lien	
207.		507. Interest Adjustment	
208. Equity Transfer	6,814.00	508. from Equity Transfer	6,814.00
209.		509. Earnest Money Rec'd. by	
Adjustments for items unpaid by seller		Adjustments for items unpaid by seller	
210. City/town taxes		510. City/town taxes	
211. County taxes to		511. County Taxes to	
212. at /day		512. at /day	
213. Assessments		513. Assessments	
214.		514. Credits from Seller	
215.		515. 1986 2nd half tax	288.50
216.		516.	
217.		517.	
218.		518.	
219.		519.	
220. TOTAL PAID BY/FOR BORROWER	48,256.80	520. TOTAL REDUCTION AMOUNT DUE SELLER	46,802.31
CASH AT SETTLEMENT FROM OR TO BORROWER		600. CASH AT SETTLEMENT TO OR FROM SELLER	
301. Gross amount due from borrower (line 120)	48,436.57	601. Gross amount due to seller (line 420)	46,148.80
302. Less amounts paid by/for borrower (line 220)	48,256.80	602. Less reductions in amount due seller (line 520)	46,802.31
303. CASH (☐ FROM) (☐ TO) BORROWER	179.77	603. CASH (☐ TO) (☐ FROM) SELLER	653.51

LESS ONE DRY SYNERGIST AT 10.

Warren B. Hawthorne 12/9/86
BORROWER) DATE

(SELLER) DATE

BORROWER) DATE

(SELLER) DATE

GOVERNMENT RIGHTS

L. SETTLEMENT CHARGES		PAID FROM BORROWER'S FUNDS AT SETTLEMENT	PAID FROM SELLER'S FUNDS AT SETTLEMENT
700	TOTAL SALES/BROKER'S COMMISSION [illegible]		
	Division of Commission [illegible]		
701	$ to		
702	$ to		
703	Commission paid at Settlement		
704			
800	ITEMS PAYABLE IN CONNECTION WITH LOAN		
801	Loan Origination Fee %		
802	Loan Discount %	197.00	
803	Appraisal Fee to		109.00
804	Credit Report to	148.80	
805	Lender's Inspection Fee		
806	Mortgage Insurance Application Fee to		
807	Assumption Fee		
808	Tax Search Fee		
809	Flood Underwriting Fee		46.00
810			
811			
900	ITEMS REQUIRED BY LENDER TO BE PAID IN ADVANCE 10.16		
901	Interest from 12-1 to 12-8 at $ 76.1799 /day for 7 days credit	71.12-	
902	Mortgage Insurance Premium for 360 mo. to HUD	1,508.60	
903	Hazard Insurance Premium for yrs. to	P.O.C.	
904	yrs. to		
905	Flood Insurance Premium yrs. to		
1000	RESERVES DEPOSITED WITH LENDER FOR		
1001	Hazard Insurance 1 mo. at $ 18.50 /mo.	55.50	
1002	Mortgage Insurance mo. at $ /mo.		
1003	City property taxes mo. at $ /mo.		
1004	County property taxes 1 mo. at $ 48.08 /mo.	48.08	
1005	Annual assessments mo. at $ /mo.		
1006	mo. at $ /mo.		
1007	Flood Insurance mo. at $ /mo.		
1008	mo. at $ /mo.		
1100	TITLE CHARGES		
1101	Settlement or closing fee to		
1102	Abstract or title search to		
1103	Title examination to		
1104	Title insurance binder to		
1105	Document preparation to		
1106	Notary fees to		
1107	Attorney's fees to		
	(includes above items no:)		
1108	Title insurance to		
	(includes above items no:)	119.90	188.75
1109	Lender's coverage $ 41,208.00		
1110	Owner's coverage $ 41,208.00		
1111	Endorsements 100 & 116 to Title Insurance Policy		
1112			
1113		50.00	50.00
1200	GOVERNMENT RECORDING AND TRANSFER CHARGES		
1201	Recording fees: Deed $ 10.00 Mortgage $ 25.00 Releases/assignments $ 20.00	35.00	20.00
1202	City, county tax/stamps: Deed $ Mortgage $		
1203	State tax/stamps: Deed $ Mortgage $		
1204			
1205			
1300	ADDITIONAL SETTLEMENT CHARGES		
1301	Survey to		
1302	Pest inspection to		
1303	Private		
1304	Inspection Fee		
1305			
1400	TOTAL SETTLEMENT CHARGES (enter on lines 103 and 502, Sections J and K)	2,287.77	611.81

I have carefully reviewed the HUD-1 Settlement Statement and to the best of my knowledge and belief, it is a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction. I further certify that I have received a copy of the HUD-1 Settlement Statement.

Warren B. Hawthorne, I

Borrower

Seller

The HUD-1 Settlement Statement which I have prepared is a true and accurate account of this transaction. I have caused or will cause the funds to be disbursed in accordance with this statement.

Attorney-in-fact

Date: December 8, 1986.

WARNING: It is a crime to knowingly make false statements to the United States on this or any other similar form. Penalties upon conviction can include a fine and imprisonment. For details see: Title 18 U.S. Code Section 1001 and Section 1010.

KOZINSKI, Circuit Judge, with whom WALLACE, Chief Judge, and LEAVY, RYMER and T.G. NELSON, Circuit Judges, join, dissenting:

Court of appeals opinions, particularly en banc opinions, frequently raise waves on the waters of the law. Today's opinion is more akin to a tsunami. It's not every day, after all, that we provoke a conflict with every other regional circuit, defy Supreme Court authority, implicitly overrule several lines of our own case law—thereby creating a spiderweb of secondary circuit conflicts—and pave the way for successful habeas petitions for scores, perhaps hundreds, of prisoners convicted of a broad range of federal crimes.

This upheaval might be justified if we were facing a problem not addressed or understood by other courts. In fact, though, whether the materiality of false statements to the government is a question of fact or of law has been kicking around for some time, and every other regional circuit has concluded that it is a question of law to be decided by the district judge. It seems imprudent for us to mount an assault on this donjon of federal court authority. To also defy the Supreme Court because we can't believe the Court meant what it said, Majority op. at 6651, only underscores the boldness of our foray.

That Gaudin never objected to the error below further complicates the matter. The majority, like the three judge panel, holds that all *Winship* error is perforce plain error. *See* Majority op. at 6661; *see also United States v. Gaudin*, 997 F.2d 1265, 1272-73 (9th Cir. 1993). This is not only very bad policy; it misapplies the Supreme Court's most recent pronouncement and precipitates further circuit conflicts. Finally, as happened in the wake of *McNally v. United States*, 483 U.S. 350 (1987), today's opinion will cause a large number of criminal convictions to be vacated on both direct appeal and habeas, haunting the law of our circuit for years to come.

I

A. *Conflicts with Other Circuits*

Every other circuit to have considered whether materiality under 18 U.S.C. § 1001 is a question of fact or a question of law—which means every circuit except the Federal—has held that it's a question of law: *See United States v. Corsino*, 812 F.2d 26, 31 n.3 (1st Cir. 1987) (disagreeing with *United States v. Valdez*, 594 F.2d 725, 729 (9th Cir. 1979), and ruling that materiality is a question of law); *United States v. Bernard*, 384 F.2d 915, 916 (2d Cir. 1967); *United States v. Elkin*, 731 F.2d 1005, 1009 (2d Cir. 1984);[1] *United States v. Greber*, 760 F.2d 68, 73 (3d Cir. 1985); *Nilson Van & Storage Co. v. Marsh*, 755 F.2d 362, 367 (4th Cir. 1985); *United States v. Hausmann*, 711 F.2d 615, 616-17 (5th Cir. 1983); *United States v. Chandler*, 752 F.2d 1148, 1150-51 (6th Cir. 1985); *United States v. Brantley*, 786 F.2d 1322, 1327 & n.2 (7th Cir. 1986); *United States v. Hicks*, 619 F.2d 752, 758 (8th Cir. 1980); *United States v. Daily*, 921 F.2d 994, 1004 (10th Cir. 1990); *United States v. Lopez*, 728 F.2d 1359, 1362 n.4 (11th Cir. 1984); *United States v. Hansen*, 772 F.2d 940, 950 (D.C. Cir. 1985).

All these courts considered (or reconsidered) this issue after our contrary holding in *Valdez* and remained unpersuaded. What more can one possibly say except that the maverick spirit is alive and well here in the West?

B. *Conflict with the Supreme Court*

Given the diversity of views normally displayed by court of appeals judges, there must be a pretty good reason for

---

[1] The Second Circuit is somewhat atypical because it holds that materiality is not an element of the second clause of 18 U.S.C. § 1001. *Elkin*, 731 F.2d at 1009.

such monolithic uniformity. And there is: The Supreme Court has cases directly on point. Over six decades ago, the Court held in *Sinclair v. United States*, 279 U.S. 263, 298-99 (1929), that materiality—or at least pertinency—is a legal issue in false statement prosecutions. When charged with failing to answer "any question pertinent to the question under inquiry" by Congress, *id.* at 285, Sinclair argued that pertinency was a factual question—the same claim Gaudin makes about materiality under section 1001. The Court disagreed: "That question may be likened to those concerning relevancy at the trial of issues in court, and it is not essentially different from the question as to materiality of false testimony charged as perjury in prosecutions for that crime. . . . [T]he materiality of what is falsely sworn, when an element in the crime of perjury, is one for the court." *Id.* at 298.

The continued vitality of *Sinclair* is subject to legitimate question because it antedated the Court's *Winship* line of cases. Majority op. at 6647-48. But *Sinclair* was given new life in *Kungys v. United States*, 485 U.S. 759 (1988), where the Court held that materiality, as that term is used in 8 U.S.C. § 1451, is a question of law. In reaching that conclusion, the Court expressly reaffirmed *Sinclair* and relied heavily on the Sixth Circuit's analysis in *United States v. Abadi*, 706 F.2d 178 (6th Cir. 1983), a criminal case involving 18 U.S.C. § 1001. *Kungys*, 485 U.S. at 772.

The majority does not find itself bound by *Kungys* because *Kungys* was not a criminal case and so did not raise a *Winship* issue. Majority op. at 6655-57. But *Kungys* cannot be so easily cast aside. Something is either a question of law or a question of fact; it can't be both. Once it is held to be a question of law—as materiality was in *Kungys*—certain consequences follow. One is that the standard of review is de novo rather than for substantial evidence. Another is that, in a criminal case, it need not be

decided by a jury. The majority confuses these consequences with the initial determination by conjecturing that the Court would have reached a different conclusion in *Kungys* had it but focused on *Winship*. *Id.* In fact, there is no tension between *Kungys* and *Winship*: Once materiality is deemed to be a question of law, *Winship* poses no impediment to having it determined by the court in a criminal case. By refusing to accept *Kungys*'s clear ruling on that point, the majority is placed in the awkward position of holding that something is a question of fact for purposes of *Winship* even though it is a question of law for purposes of appellate review.

The determination in *Kungys* that materiality is a question of law was not dicta, but a considered aspect of the Court's holding.[2] We need not agree with the Court and are surely entitled to point out that its ruling may have unintended consequences. The Court can reconsider its case law in light of experience or new information; we must apply it as written.

This is the conclusion reached by the Tenth Circuit. Before *Kungys*, that court, like our own, had held that materiality under section 1001 was a question for the jury. *See United States v. Irwin*, 654 F.2d 671, 677 n.8 (10th Cir. 1981); *United States v. Radetsky*, 535 F.2d 556, 571 (10th Cir. 1976). But *Kungys* caused it to change its rule:

> Upon consideration of . . . *Kungys*, we conclude that materiality under § 1001 is a question of law for the court and, accordingly, the trial court's refusal to

---

[2] Even if it *were* dicta, we could not lightly ignore it: "[F]ederal appellate courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when, as here, a dictum is of recent vintage and not enfeebled by any subsequent statement." *McCoy* v. *Massachusetts Inst. of Technology*, 950 F.2d 13, 19 (1st Cir. 1991); *see also United States* v. *Underwood*, 717 F.2d 482, 486 (9th Cir. 1983).

> submit the materiality issue under § 1001 to the jury was not error. The court now disavows our prior holdings to the contrary. We are mindful that our panel is bound by prior decisions of this court, but we are authorized by all the active judges of this court to state that the court endorses this overruling of our prior cases on the materiality issue under § 1001 in light of the Supreme Court's guidance in *Kungys*.

United States v. Daily, 921 F.2d 994, 1004 (10th Cir. 1990) (citations and footnote omitted). Confronted with the compelling authority of *Kungys*, the Tenth Circuit recognized its duty and, effectively, went en banc to bring its case law in line with the Supreme Court. We should be doing the same.

C. *Implicit Overruling of Our Case Law in Other Areas*

Although the majority only interprets 18 U.S.C. § 1001, its rationale sweeps much farther. If materiality is a question of fact for the jury in section 1001 prosecutions, it's a question of fact in other contexts as well. The majority recognizes the clear implications of its holding by noting that "it seems to be courting constitutional error to withdraw the materiality question from the jury in other perjury and false statement cases because of the difficulty in concluding that there is no factual component for jury determination." Majority op. at 6655.

We have a substantial body of case law holding that materiality is a question of law under a variety of statutes. Thus judges, not juries, decide the materiality of false statements in tax returns. *United States v. Flake*, 746 F.2d 535, 537-38 (9th Cir. 1984) (construing 26 U.S.C. § 7206); *see id.* (confining *Valdez* to section 1001). Ditto for false statements to grand juries, *United States v. Prantil*, 764 F.2d 548, 557 (9th Cir. 1985) (construing 18 U.S.C. § 1623), *United States v. Dipp*, 581 F.2d 1323, 1328 (9th

Cir. 1978) (discussing information judge needs to make materiality determination under section 1623), *United States v. Sisack*, 527 F.2d 917, 920 n.2 (9th Cir. 1975) (judge must decide materiality under section 1623), *United States v. Percell*, 526 F.2d 189, 190 (9th Cir. 1975) (same); for false statements in applications for payments in federally-approved plans for medical assistance, *United States v. Larm*, 824 F.2d 780, 783-84 (9th Cir. 1987) (construing predecessor to 42 U.S.C. § 1320a-7b); *see id.* at 783 (noting *Valdez* has been limited to section 1001); and for perjury, *United States v. Clark*, 918 F.2d 843, 845-46 (9th Cir. 1990) (construing 18 U.S.C. § 1621), *see id.* (confining *Valdez* to section 1001 because circuit had done so twice before), *Vitello v. United States*, 425 F.2d 416, 423 (9th Cir. 1970) (construing section 1621).

Without mentioning these cases, the majority cuts the ground out from under them:

> In our circuit, we have held that the issue of materiality in most of these statutes is a question of law for the judge. The exception has been section 1001 cases . . . The opinions holding that the issue of materiality in these criminal cases is a matter of law for the court to decide have relied on the 1929 Supreme Court case of *Sinclair...The essential issue before us is whether the opinions relying on* Sinclair *survive* . . .

Majority op. at 6646-47 (emphasis added). The majority takes particular aim at our cases involving perjury and false statements to the grand jury. *Id.* at 6653-54.

The majority tries to hedge its bets by suggesting that the effect of its ruling on "future prosecutions under other statutes" is somehow an open question. Majority op. at 6651 n.2. This is difficult to square with the majority's ominous language about "courting constitutional error" if the question of materiality is withdrawn from the jury

"in other perjury and false statement cases." *Id.* at 6655. As a practical matter, this warning may be sufficient to prevent district courts from following our earlier case law, particularly since the aggrieved party—the government—can't appeal.

It's fair to say, therefore, that we have effectively (though tacitly) laid these cases to rest. In so doing, we unleash a series of further conflicts with our sister circuits. Take, for example, false statements in tax returns. By abandoning *Flake*, we create a conflict with six other circuits—all of which have assigned the materiality inquiry to the judge. *See United States v. Romanow*, 509 F.2d 26, 28 (1st Cir. 1975) (materiality of false statements in tax return under 18 U.S.C. § 7206 decided by judge); *United States v. Greenberg*, 735 F.2d 29, 31 (2d Cir. 1984) (same); *United States v. Taylor*, 574 F.2d 232, 235 (5th Cir. 1978) (same); *United States v. Haynes*, 573 F.2d 236, 240 (5th Cir. 1978) (same); *Hoover v. United States*, 358 F.2d 87, 89 (5th Cir. 1966) (same); *United States v. Whyte*, 699 F.2d 375, 379 (7th Cir.1983) (same); *United States v. Strand*, 617 F.2d 571, 573 (10th Cir. 1980) (same); *United States v. Gaines*, 690 F.2d 849, 858 (11th Cir. 1982) (same). *But see United States v. Null*, 415 F.2d 1178, 1181 (4th Cir. 1969) (submitting issue to jury).

Or, take our cases holding that judges should decide the materiality of false statements made to a grand jury. *See Prantil*, 764 F.2d at 557 (construing 18 U.S.C. § 1623); *Dipp*, 581 F.2d at 1328 (same); *Sisack*, 527 F.2d at 920 n.2 (same); *Percell*, 526 F.2d at 190 (same). In sweeping aside these cases, the majority creates a conflict with fifty-one cases and—not surprisingly—every other regional circuit. *See United States v. Paxson*, 861 F.2d 730, 731 (D.C. Cir. 1988); *United States v. Bridges*, 717 F.2d 1444, 1448 (D.C. Cir. 1983); *United States v. Glantz*, 847 F.2d 1, 10 (1st Cir. 1988); *United States v. Stackpole*, 811 F.2d 689, 695 (1st

Cir. 1987); *United States v. Collatos*, 798 F.2d 18, 19 (1st Cir. 1986); *United States v. Scivola*, 766 F.2d 37, 44 (1st Cir. 1985); *United States v. Kehoe*, 562 F.2d 65, 68 (1st Cir. 1977); *United States v. Doherty*, 867 F.2d 47, 69 (1st Cir. 1989); *United States v. Kiszewski*, 877 F.2d 210, 218 (2d Cir. 1989); *United States v. Lighte*, 782 F.2d 367, 372 (2d Cir. 1986); *United States v. Weiss*, 752 F.2d 777, 786 (2d Cir. 1985); *United States v. Cunningham*, 723 F.2d 217, 226 (2d Cir. 1983); *United States v. Moon*, 718 F.2d 1210, 1237 (2d Cir. 1983); *United States v. Berardi*, 629 F.2d 723, 728 (2d Cir. 1980); *United States v. Mulligan*, 573 F.2d 775, 779 (2d Cir. 1978); *United States v. Mancuso*, 485 F.2d 275, 280 (2d Cir. 1973); *United States v. Slawik*, 548 F.2d 75, 79 (3d Cir. 1977) (in dicta); *United States v. Weiler*, 143 F.2d 204, 204 (3d Cir. 1944) (involving predecessor statute), *rev'd on other grounds*, 323 U.S. 606 (1945); *United States v. Flowers*, 813 F.2d 1320, 1325 (4th Cir. 1987); *United States v. Farnham*, 791 F.2d 203, 203 (4th Cir. 1985); *United States v. Paolicelli*, 505 F.2d 971, 973 (4th Cir. 1974); *United States v. Holley*, 942 F.2d 916, 923 (5th Cir. 1991); *United States v. Abroms*, 947 F.2d 1241, 1246 (5th Cir. 1991); *United States v. Nixon*, 816 F.2d 1022, 1029 (5th Cir. 1987); *United States v. Thompson*, 637 F.2d 267, 268 (5th Cir. 1981); *United States v. Bell*, 623 F.2d 1132, 1134 (5th Cir. 1980); *United States v. Forrest*, 623 F.2d 1107, 1113 (5th Cir. 1980); *United States v. Damato*, 554 F.2d 1371 (5th Cir. 1977); *United States v. Parr*, 516 F.2d 458, 470 (5th Cir. 1975); *Brooks v. United States*, 253 F.2d 362, 364 (5th Cir. 1958); *United States v. Giacalone*, 587 F.2d 5, 6 (6th Cir. 1978); *United States v. Bullock*, 857 F.2d 367, 371 (7th Cir. 1988); *United States v. Watson*, 623 F.2d 1198, 1201 (7th Cir. 1980); *United States v. Smith*, 538 F.2d 159, 163 (7th Cir. 1976); *United States v. Demopoulos*, 506 F.2d 1171, 1176 (7th Cir. 1974); *United States v. Brimberry*, 779 F.2d

1339, 1349 (8th Cir. 1985); *United States v. Bednar*, 728 F.2d 1043, 1047 (8th Cir. 1984); *United States v. Armillo*, 705 F.2d 939, 942 (8th Cir. 1983); *United States v. Ostertag*, 671 F.2d 262, 265 (8th Cir. 1982); *United States v. Jackson*, 640 F.2d 614, 616 n.2 (8th Cir. 1981); *United States v. Beitling*, 545 F.2d 1106 (8th Cir. 1976); *United States v. Phillips*, 540 F.2d 319, 328 (8th Cir. 1976); *Tasby v. United States*, 504 F.2d 332, 337 (8th Cir. 1974); *United States v. Koonce*, 485 F.2d 374, 380 (8th Cir. 1973); *United States v. Larranaga*, 787 F.2d 489, 494 n.1 (10th Cir. 1986); *United States v. Girdner*, 773 F.2d 257, 259 (10th Cir. 1985); *United States v. Masters*, 484 F.2d 1251, 1254 (10th Cir. 1973); *Travis v. United States*, 123 F.2d 268, 270 (10th Cir. 1941) (involving predecessor statute); *United States v. Dekle*, 768 F.2d 1257, 1262 (11th Cir. 1985); *United States v. Molinares*, 700 F.2d 647, 653 (11th Cir. 1983).

In quietly burying our rule that a judge decides the materiality of perjured statements under 18 U.S.C. § 1621, *see United States v. Clark*, 918 F.2d 843, 845-46 (9th Cir. 1990); *Vitello v. United States*, 425 F.2d 416, 423 (9th Cir. 1970), the majority generates yet another conflict —this time with six other circuits. *See United States v. Alu*, 246 F.2d 29, 32 (2d Cir. 1957); *Forrest*, 623 F.2d at 1113; *United States v. Gremillion*, 464 F.2d 901, 904 (5th Cir. 1972); *United States v. Edmondson*, 410 F.2d 670, 674 n.3 (5th Cir. 1969); *Barnes v. United States*, 378 F.2d 646, 650 (5th Cir. 1967); *Giacalone*, 587 F.2d at 6; *United States v. Rivera*, 448 F.2d 757, 758 (7th Cir. 1971); *United States v. Parker*, 447 F.2d 826, 830 (7th Cir. 1971); *United States v. Parker*, 244 F.2d 943, 950 (7th Cir. 1957); *Masinia v. United States*, 296 F.2d 871, 874 (8th Cir. 1961); *Dolan v. United States*, 218 F.2d 454, 457 (8th Cir. 1955); *Masters*, 484 F.2d at 1254.

The disruption is greater still. I've only mentioned five statutes—ones where our circuit has already held who decides materiality. But the majority's theory easily covers all statutes that contain a similar materiality requirement. How many other criminal statutes punish those who make material false statements to a government agency? My research discloses forty-three that have explicit materiality requirements[3] and another fifty-four where such a re-

---

[3] *See* 7 U.S.C. § 13(a)(3) (felony to knowingly make statement that "was false or misleading with respect to any material fact" in report required by statute or futures association); 8 U.S.C. § 1160(b)(7) (penalizing knowing and willful false statement of material fact in application for status of special agricultural worker); 8 U.S.C. § 1225a(c)(6) (penalizing knowing and willful false statement of material fact in application for special status by virtue of entering U.S. before Jan. 1, 1982); 8 U.S.C. § 1325(a) (penalizing improper entry into U.S. by virtue of willful false statement of material fact); 10 U.S.C. § 931 (perjury in military proceeding); 18 U.S.C. § 152 (maximum five year sentence for knowing and fraudulent receipt of material amount of property with intent to defeat bankruptcy code); 18 U.S.C. § 542 (maximum prison term of two years for entry of goods by means of material false statement); 18 U.S.C. § 1919 (maximum one year prison term for false statement of material fact knowingly made to obtain unemployment compensation for federal service); 19 U.S.C. § 1629(f)(2) (maximum five year prison term for any person who knowingly and willfully covers up a material fact from customs official); 19 U.S.C. § 1919 (maximum two year prison term for knowingly making false statement of material fact with intent to influence tariff adjustment); 19 U.S.C. § 2316 (maximum one year prison term for knowingly making false statement of material fact when seeking relief from injury under section 2311); 19 U.S.C. § 2349 (maximum two year prison term for making false statement of material fact for purposes of obtaining relief from injury under Trade Act of 1974); 20 U.S.C. § 1097(b) (maximum one year prison term for knowingly and willfully concealing material information in connection with assignment of federally insured student loan); 20 U.S.C. § 4442(c)(1) (maximum one year prison term for knowingly making false statement of material fact in seeking cultural and art development grants); 22 U.S.C. § 618(a)(2) (maximum six month prison term

for willfully making false statement of material fact in registering to distribute political propaganda); 22 U.S.C. § 2778(c) (maximum 10 year prison term for willfully making untrue statement of material fact in report required for control of arms exports and imports); 26 U.S.C. § 7206(1) (maximum three year prison term for willfully making false declaration as to material matter regarding income taxes when under penalty of perjury); 26 U.S.C. § 9012(d) (maximum five year prison term for knowingly and willfully making misrepresentation of material fact during examination of campaign's matching payment account); 29 U.S.C. § 439(b) (maximum one year prison term for person who knowingly makes false statement of material fact in report required under section 431); 29 U.S.C. § 462(d) (maximum one year prison term for knowing misrepresentation of material fact in report labor organization must file once it assumes trusteeship over subordinate organization); 31 U.S.C. § 5324(b)(2) (prohibiting material omission or misstatement of fact in report on monetary instruments transactions); 42 U.S.C. § 290cc-32 (maximum five year prison term for knowingly making false statement of material fact in sale to state for items or services funded by federal government under Medicare); 42 U.S.C. § 300d-20 (same); 42 U.S.C. § 300e-17(h) (maximum five year prison term for knowingly and willfully making false statement of material fact in an HMO's financial disclosure); 42 U.S.C. § 300w-8(1) (maximum five year prison term for knowingly and willfully making false statement of material fact in sale to state of items or services subsidized by federal government); 42 U.S.C. § 300x-56(b) (same); 42 U.S.C. § 300dd-9 (same—under formula grants to states for care of AIDS patients); 42 U.S.C. § 300ee-19(b) (same—under funds for AIDS prevention); 42 U.S.C. § 707(a)(1) (same—under funds for social security); 42 U.S.C. § 1320a-7b(a)(1) (maximum five year prison term for knowingly and willfully making false statement of material fact in application for payments in federally-approved plans for medical assistance); 42 U.S.C. § 1383a(a)(1) (maximum one year prison term for knowingly and willfully making false statement of material fact in application for Supplemental Security Income benefits); 42 U.S.C. § 1973i (penalizing knowingly false information for purpose of establishing eligibility to vote); 42 U.S.C. § 3795a (penalizing knowing and willful misstatement or concealment of material fact in any application or record required under chapter); 42 U.S.C. § 6928(d)(3) (maximum two year prison term for knowingly making false material statement in compliance documents); 42 U.S.C. § 6992(b)(2) (maximum two year

quirement is probably implied.[4] And, of course, other courts have already held that materiality in a number of

---

prison term for knowingly making material statement in compliance documents); 42 U.S.C. § 7413(c)(2) (maximum two year prison term for knowingly making false material statement in documents required under chapter); 46 U.S.C. § 1171(b) (any person who, in application for financial aid under merchant marine act, willfully makes untrue statement of material fact is guilty of misdemeanor); 46 U.S.C. § 31306(d) (maximum five year prison sentence for knowingly making false statement of material fact in declaration of citizenship under Shipping Act); 46 U.S.C. App. § 839 (maximum five year prison term for knowingly making false statement of material fact to secure required approval of Secretary of Transportation); 49 U.S.C. App. § 1472 (maximum three year prison term for knowingly and willfully falsifying or concealing a material fact to obtain FAA certificate); 50 U.S.C. § 855 (maximum five year prison term for willfully making false statement of material fact in registration statement); 50 U.S.C. App. § 1193(h) (maximum two year prison term for knowingly furnishing information that is false or misleading in any material respect regarding renegotiation of airplane contracts).

[4] *See* 7 U.S.C. § 614(b-3)(3) (penalizing those who make false statement in application for tax-payment warrant); 7 U.S.C. § 2028(d) (punishing those who obtain funds from a Puerto Rico block grant "by . . . false statement"); 7 U.S.C. § 6407(e) (barring "false or unwarranted statements" regarding fluid milk products); 12 U.S.C. § 1782(a)(3) (penalizing false statement in administration of insurance fund); 13 U.S.C. § 213 (penalties for perjury); 12 U.S.C. § 1847 (penalizing false entries in book, report, or statement of bank holding company); 15 U.S.C. § 50 (penalizing false statement to FTC); 15 U.S.C. § 645 (offenses and penalties for certain crimes related to commerce and trade); 15 U.S.C. § 714m (punishing knowingly false statement to Commodity Credit Corporation); 15 U.S.C. § 1825(a)(2)(B) (penalizing false statement in report required by Horse Protection Act); 16 U.S.C. § 813t(b) (penalizing false statement to or on behalf of the Tennessee Valley Authority); 18 U.S.C. § 287 (penalizing false claims against U.S. government); 18 U.S.C. § 288; (penalizing false claims for postal losses); 18 U.S.C. § 289 (penalizing false claims for pensions); 18 U.S.C. § 924 (penalizing knowing false statement in in-

formation gun dealers must provide); 18 U.S.C. § 1011 (penalizing knowing false statement in sale of mortgage to federal land bank); 18 U.S.C. § 1012 (penalizing intentional false entry in book of Department of Housing and Urban Development); 18 U.S.C. § 1014 (penalizing false statement to influence federal loan or credit agency); 18 U.S.C. § 1015 (penalizing false statement in naturalization proceeding); 18 U.S.C. § 1018 (penalizing public official who knowingly falsifies official certificate or writing); 18 U.S.C. § 1020 (penalizing false statement regarding highway projects); 18 U.S.C. § 1026 (penalizing false statement regarding farm indebtedness for purpose of influencing Secretary of Agriculture); 18 U.S.C. § 1027 (penalizing false statement in documents required by ERISA); 18 U.S.C. § 1158 (penalizing false statement to secure Indian Arts & Crafts Board trademark); 18 U.S.C. § 1542 (penalizing willful and knowing false statement in passport application); 18 U.S.C. § 1546 (penalizing false statement in immigration documents); 18 U.S.C. § 1712 (penalizing falsification of postal returns to increase compensation); 18 U.S.C. § 1920 (penalizing false statement to obtain Federal employees' compensation); 18 U.S.C. § 2386 (penalizing willful false statement when registering certain organizations); 18 U.S.C. § 2388(a) (penalizing willful false statement with intent to interfere with armed forces during war); 18 U.S.C. § 2424 (penalizing knowing and willful false statement about alien procured or maintained for immoral purposes); 22 U.S.C. § 1980(g) (penalizing false statement in seeking compensation for loss or destruction of commercial fishing vessel or gear); 22 U.S.C. § 2197(n) (penalizing false statement regarding federal insurance of investment in foreign nations); 26 U.S.C. § 7232 (penalizing false statement regarding registration as manufacturer or dealer in gasoline); 29 U.S.C. § 666(g) (penalizing false statement in health and safety report required under this chapter); 30 U.S.C. § 820 (penalizing false statement in document required under subchapter governing mine safety and health); 30 U.S.C. § 941 (penalizing false statement or representation in seeking benefits under subchapter governing mine safety and health); 30 U.S.C. § 1232(d)(1) (penalizing false statement in report submitted with reclamation fee); 30 U.S.C. § 1268(g) (penalizing false statement in documents required by Federal program or Federal Lands program regarding surface mining); 31 U.S.C. § 5322 (penalizing willful violations of subchapter); 33 U.S.C. § 931 (penalizing false statement for purpose of obtaining workers' compensation benefit); 33 U.S.C. § 990(b) (penalizing false statement to cor-

these statutes should be decided by the judge,[5] and will no doubt interpret the others consistent with their prevailing case law.

---

poration governing Saint Lawrence Seaway); 33 U.S.C. § 1319(c)(2) (penalizing knowing false statement in record required by chapter on navigation and navigable waters); 38 U.S.C. § 1987 (penalizing knowing false statement in application, waiver of premium, or claim for benefits, for National Service Life Insurance or U.S. Government life insurance); 40 U.S.C. § 883(b) (penalizing false statement to Pennsylvania Avenue Development Corp.); 42 U.S.C. § 408 (penalizing false statement to obtain social security benefits); 42 U.S.C. § 1761(o) (penalizing false statement in connection with summer food service programs for children at service institutions); 42 U.S.C. § 1973i(c) (penalizing knowing false information for purpose of establishing eligibility to vote); 42 U.S.C. § 3220 (penalizing knowing false statement to obtain financial assistance or defraud Secretary of Department of Health and Human Services); 42 U.S.C. § 4912(c) (penalizing false statement in documents filed pursuant to chapter's noise control requirements); 43 U.S.C. § 1350(c) (penalizing knowing false statement in application required under subchapter on submerged public lands); 45 U.S.C. § 231(l)(a) (penalizing knowing false statement in report required by subchapter on Rail Road Retirement Accounts); 45 U.S.C. § 359(a) (penalizing knowing false statement to obtain unemployment insurance); 49 U.S.C. Appx. § 2216 (penalizing U.S. officials who knowingly make false statement regarding projects submitted for approval of Secretary of Transportation).

[5] For cases assigning materiality to the judge in statutes with express materiality requirements, see *United States* v. *Key*, 859 F.2d 1257 (7th Cir. 1988) (construing 18 U.S.C. § 152); *United States* v. *Marachowsky*, 201 F.2d 5 (7th Cir. 1953) (same); *United States* v. *Brown*, 763 F.2d 984 (8th Cir. 1985) (construing predecessor to 42 U.S.C. § 1320a-7b).

For cases assigning materiality to the judge in statutes with an implied materiality requirement, see *United States* v. *Elkin*, 731 F.2d 1005 (2d Cir. 1984) (construing 18 U.S.C. §§ 287, 1001); *United States* v. *Cleary*, 565 F.2d 43 (2d Cir. 1977) (construing 18 U.S.C. § 1014); *United States* v. *Whaley*, 786 F.2d 1229 (4th Cir. 1986) (construing 18 U.S.C. § 1014); *United States* v. *Lueben*, 838 F.2d 751 (5th Cir. 1988) (construing 18 U.S.C. §§ 1014, 1001); *United States* v. *Thompson*,

D. *Misinterpretation of 18 U.S.C. § 1001*

The majority paints itself into a solitary corner within the federal judiciary by adopting a peculiarly narrow and fact-bound interpretation of 18 U.S.C. § 1001's materiality requirement. According to the majority, "It would seem that a factual inquiry would nearly always be necessary to determine what makes a difference to the decisionmaking body." Majority op. at 6653. Thus, the majority would require "testimony of department officials in order to determine whether the block checked on line 303 of the settlement statement would tend to influence the agency's decision to insure the loan." *Id.* at 6658.

Every legal principle must, of course, be factually anchored to the case where it is applied. But the question under section 1001 is not whether a particular statement in a specific case actually influenced (or could have influenced) the agency's decision, but whether the statement in question had the "*intrinsic capability* of influencing or affecting the agency's or department's decision." *Valdez*, 594 F.2d at 728 (emphasis added). Thus, the Sixth Circuit has held, "The fact that the misstated amounts are relatively small when compared with total [sums in question] is not particularly relevant to the issue of materiality. Instead, the relevant inquiry is whether the false information is of the type that is capable of influencing a decision of an agency, as opposed to an examination of the magni-

---

811 F.2d 841 (5th Cir. 1987) (same); *United States* v. *Shriver*, 842 F.2d 968 (7th Cir. 1988) (construing 18 U.S.C. § 1014); *United States* v. *Kalagian*, 957 F.2d 527 (8th Cir. 1992) (construing 42 U.S.C. § 408); *United States* v. *Pruitt*, 702 F.2d 152 (8th Cir. 1983) (construing § 287); *Johnson* v. *United States*, 410 F.2d 38 (8th Cir. 1969) (construing § 287); *United States* v. *Haddock*, 956 F.2d 1534 (10th Cir. 1992) (construing 18 U.S.C. § 1014).

tude of the falsehood." *Hughes v. United States*, 899 F.2d 1495, 1499 (6th Cir. 1990). And the Eleventh Circuit has framed the question as whether the agency "routinely utilizes the information" in carrying out its function. *United States v. Gafyczk*, 847 F.2d 685, 691 (11th Cir. 1988). The Fifth Circuit has noted that "a statement may be material even though the Government does not actually rely on it" if "disclosure of the truth could have provoked the agency to action." *United States v. McIntosh*, 655 F.2d 80, 83 (5th Cir. 1981); *see also United States v. Keefer*, 799 F.2d 1115, 1127 (6th Cir. 1986) ("[T]he test for materiality is not whether the agency *actually* relied on the false statement, but whether the statement was *capable of influencing*, or had a natural tendency to influence, the agency's decision."); *United States v. Jones*, 464 F.2d 1118, 1123 (8th Cir. 1972) (test is "[t]he potential for an adverse effect upon the exercise of a government function"). Most notably, the Supreme Court told us in *Kungys* that materiality turns on "whether the misrepresentation or concealment was *predictably capable of affecting*, i.e., *had a natural tendency to affect,* the official decision." 485 U.S. at 771 (emphasis added).

In contrast to this body of authority, the majority focuses narrowly on the particular circumstances of this case, noting, for example, that "[s]ome of the amounts written on line 303 were trivial." Majority op. at 6658. Under the majority's tight focus, materiality must be determined form by form, transaction by transaction, count by count.

This is too fact-specific an inquiry. The proper question is whether false entries on a key line of a government-approved loan application have "a natural tendency to affect" the agency's decision, regardless of the amount in question. Plainly, the answer is yes. While the majority opines that "the form and the certification are very poorly designed" to "ferret out situations where the buyer might

be serving as a stand-in for the seller or another person and did not intend to keep the house," Majority op. at 6646, the form serves precisely this purpose. Whether the amount in question is $31 or $31,000, to make line 303 accurate, Gaudin would have had to strike out the word "BORROWER," which follows the boxes marked "TO" and "FROM," and write in "SELLER." The form can be truthfully signed without such an interlineation only when there is a bona fide buyer and seller. By engineering a series of sham transactions, Gaudin was boxed into an unpalatable choice: He could either sign the form as printed and thereby tell a lie, or make telltale modifications to the form that "could have provoked the agency to action." *McIntosh*, 655 F.2d at 83.[6]

Whether the misstatements were material, then, calls for a generalized determination about whether claiming a party will pay or receive a sum (large or small)—when in fact it won't—is the type of representation where "a truthful answer could help the inquiry, or a false response hinder it." *United States v. Berardi*, 629 F.2d 723, 728 (2d Cir. 1980) (noting also that "these effects are weighed in terms of potentiality rather than probability"). Like relevance and pertinency, *cf. Sinclair v. United States*, 279 U.S. 263, 298-99 (1929), this is the sort of preliminary determination

---

[6] The majority finds it "significant that the only possible blocks to be checked are cash 'to' or 'from' the 'borrower.' " Majority op. at 6645. I don't see why. After all, by signing a government form, a party verifies the truth not merely of the information it writes or types in, but also of the printed matter the party adopts by placing a check mark or an amount in a relevant blank. Thus, for example, by filling in "$2000" on line 24a of Treasury Form 1040 (1993), a taxpayer is not merely verifying that he paid exactly $2000 into *an* account. He is also verifying that the account is one he reasonably believes qualifies as an IRA. Similarly, line 303, in our case, makes a liar of anyone who swears that any amount is coming to or from him, unless he is in fact the borrower.

that does not vary significantly with the facts of each individual transaction and therefore does not require a jury finding under *Winship*.

As the Sixth Circuit has noted, "[although the materiality of a statement rests upon a factual evidentiary showing, the ultimate finding of materiality turns on an interpretation of substantive law." *Abadi*, 706 F.2d at 180. To make this determination, the district court must understand the workings of the federal agency and the role the false statement plays (or could play) in its decisionmaking process. This is not a pro forma inquiry, to be sure. For example, if the agency requests information about the borrower's ethnic background, the district court would have to consider whether this would be relevant to the agency's mission. Where the loan program provides a preference for certain ethnic or other groups (*e.g.*, Native Americans, veterans), the misinformation would be material because it could well influence the agency's decision. But if the information is being collected for statistical purposes or as a courtesy to another agency (*e.g.*, the Civil Rights Commission), a court might well conclude that the information is not material because the misstatement does not affect the agency's mission in any meaningful way. In either event, however, the inquiry calls for the kind of parsing of an agency's statutory delegation of authority that is not normally subject to proof before a jury.

II

Even if the majority were right that materiality is a question of fact, Gaudin's conviction would nevertheless have to be affirmed because he never objected to the judge's materiality instruction.[7] Consequently, we cannot disturb

---

[7] I do not disagree that if there was error, it was harmful. *See* Majority op. at 6659-60.

the conviction without finding plain error – something the majority finds far too readily.

In *United States v. Olano*, 113 S. Ct. 1770 (1993), the Court interpreted Fed. R. Crim. P. 52(b) as imposing a three-prong test. First, there must have been a violation of a rule that was either not waived or not waivable; second, the error must have been "plain"; and third, it must have affected "substantial rights." *Id.* at 1777-78.

Assuming there was error at all here, I agree it was not waived, but merely "forfeited." *Id.* I also agree that, in light of our earlier ruling on *Valdez*, the error was "plain." *Id.* Thus my disagreement with the majority turns on the third requirement – that "substantial rights" have been affected.

Olano holds that a defendant, in showing an error affected "substantial rights," generally bears the burden of establishing that the error affected the outcome of the case. 113 S. Ct. at 1778. "[F]ederal courts have consistently interpreted the plain-error doctrine as requiring an appellate court to find that the claimed error...had [a] prejudicial impact on the jury's deliberations." *Id.* (quoting *United States v. Young*, 470 U.S. 1, 17 n.14 (1985)).

Under *Olano*, where the error consists of withdrawing an element from jury deliberation, the defendant has the burden of proving that the verdict would have been different if the element in question had been submitted to the jury. To show this, defendant must prove, at the very least, that a rational jury could have acquitted him by finding a reasonable doubt as to materiality.[8] In most cases, that

---

[8] Quite possibly, defendant must show more, namely that a rational jury *would* have acquitted him based on the missing element. The difference between could and would is substantial. To show that a rational jury could have acquitted, defendant must only show that, if it had considered all the evidence presented as to materiality, the jury might rationally have found against the prosecution on that score. To

burden will not be difficult to meet, for defendant need only show that a rational jury could have come out the other way. Defendant, however, cannot meet that burden where the evidence on the issue is so clear-cut that a rational jury could only have decided the issue in favor of the prosecution.[9]

There can be no rational doubt about how a jury would have come out here, at least as to some of the counts. Clearest perhaps are counts 44-46 "where the statements concern appraisals of market value." Majority op. at 6658-59. No rational jury could have concluded that false statements as to market value did not have "a natural tendency to affect[ ] the official decision" whether to insure a loan. *Kungys*, 485 U.S. at 771. Equally clear-cut, even under the majority's doubtful analysis, are counts where the amounts entered on line 303 involved thousands of dollars.[10] Finally, under the prevailing interpretation of section 1001, pursuant to which it doesn't matter what dollar amount was entered on line 303, *see* pp. 6679-82 *supra*, no rational jury could conclude that a signed form indicating that the money in question whatever its amount) goes to or comes from the borrower

---

show the jury would have acquitted, defendant has to show that, more likely than not, the jury would have ruled in his favor. The argument for the more stringent standard is that it is defendant who must carry the burden of showing that the error made a difference in his case. I would adopt the more lenient standard largely out of deference to our sister circuits which seem to hold that error in these circumstances will be deemed plain in most cases. *See* p. 6685 *infra*.

[9] I am aware of the jury's de facto power of nullification. However, I don't believe the defendant may rely on the possibility of such lawless action in establishing that the error in question affected his substantial rights.

[10] That would pertain to counts two ($7,022.64), three ($6,860.19), six ($7,229.90), ten ($7,708.81) and twenty-seven ($3,300.07).

(when in fact it went to or came from Mr. Gaudin) was not a material misstatement.

The majority avoids a case-specific inquiry into prejudice by doing precisely what *Olano* said we should *not* do—creating a per se rule for a vague new category it describes as "fundamental structural error."[11] Majority op. at 6661. It's unclear, however, why the error here is any more fundamental or structural than that in *Olano*. After all, the error here affected only one of several elements of the offense while the error in *Olano* (the introduction of two additional persons into the jury room) affected every single aspect of the jury's deliberations. One could say with just as much conviction that what happened in *Olano* amounts to "fundamental structural error." We undermine *Olano* severely when we create such a nebulous exception to the requirement that we weight the relevant facts and circumstances before invoking the plain error doctrine.

The majority's reliance on *Sullivan v. Louisiana*, 113 S. Ct. 2078 (1993), is entirely misplaced because *Sullivan* deals with harmless error, not plain error. As the majority recognizes, it is more difficult to find that an error is plain rather than merely harmful. Majority op. at 6659-60.

---

[11] In rejecting a per se approach, the Supreme Court was no doubt sensitive to the perverse incentives such a rule would create. Whenever we reverse for an error not raised below, we tempt defense counsel not to raise the issue before the district court, hoping to get a reversal on appeal and a second shot at an acquittal on retrial. A per se approach exacerbates this problem because it makes reversal on appeal automatic. The incentive to ambush the district judge becomes very great because defendant will be certain to get a new trial.

This may well have happened here. Despite our clearly-established law on this subject, as announced 15 years ago in *Valdez*, defense counsel did not raise the issue in time for the district court to fix the problem.

Sullivan thus provides no authority for the majority's undercutting of *Olano*.

By effectively holding that *Winship* error is always plain, the majority creates a conflict with six other circuits, which have held that *Winship* error justifies reversal in most—but not all—circumstances. *See United States v. Golomb*, 811 F.2d 787, 793 (2d Cir. 1987) ("In *general*, failure to instruct the jury on an essential element of the offense constitutes plain error.") (emphasis added); *United States v. Kerley*, 838 F.2d 932, 939 (7th Cir. 1988) (same); *Government of Virgin Islands v. Brown*, 685 F.2d 834, 839 (3d Cir. 1982) ("The omission of an essential element...*ordinarily* constitutes reversible error." (emphasis added); *United States v. Brown*, 616 F.2d 844, 846 (5th Cir. 1980) (denying that there is a "rule that failure specifically to instruct on any single essential element of a crime per se constitutes plain error"); *United States v. Baker*, 693 F.2d 183, 187 (D.C. Cir. 1982) (finding that if there was *Winship* error, it was not plain); *United States v. Polowichak*, 783 F.2d 410, 417 (4th Cir. 1986) (distinguishing error here from finding of no plain error in *Baker*). Once again, the majority's ruling is out of step with the collected wisdom of most of the circuits that have ruled on this issue.[12]

---

[12] The panel may also be stepping on the Supreme Court's toes in another way. The Court has suggested *Winship* error is not harmful per se: In *Carella v. California*, 491 U.S. 263 (1989), after finding a *Winship* error, the Court remanded for the district court to do a harmless error analysis—an unnecessary step if the Court believed *Winship* error was harmful per se. And since the test for plain error is tougher than that for harmless error—as the majority itself acknowledged, Majority op. at 6660—we know an error that's not harmful per se a fortiori can't be plain per se.

III

It is difficult to estimate the full impact of today's opinion, but it will not be trivial. First, the effect on this defendant. The majority remands for further proceedings without explaining what they will be. Presumably the majority is relying on a small portion of the panel opinion which concludes that Gaudin may be retried because there was sufficient evidence of materiality on all counts. 997 F.2d at 1273.

More serious is the effect on others already convicted under 18 U.S.C. § 1001 and the four other statutes where we had deemed materiality a question of law. *See* pp. 6670-74 *supra*. Any defendants whose convictions are now on appeal—whether for violating section 1001 or for perjury, false statements in tax returns, false statements to grand juries or false statements in applications for payments in federally-approved plans for medical assistance—will obviously get the benefit of today's ruling. *See Griffith v. Kentucky*, 479 U.S. 314, 322 (1987) ("failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication"); *see also Powell v. Nevada*, 62 U.S.L.W. 4203, 4204 (U.S. Mar. 30, 1994). This is true even if the defendants didn't object below, since the majority has deemed this type of error both harmful and plain.

The same is true of the many defendants whose convictions have become final but who are still incarcerated under these statutes. *Winship* error, after all, implicates fundamental principles of due process and casts doubt on the fairness of the proceedings. A conviction resting on such an error was probably "imposed in violation of the Constitution or laws of the United States," and thus is subject to collateral attack under 28 U.S.C. § 2255. As

happened after *McNally v. United States*, 483 U.S. 350 (1987), a host of convictions will be routinely vacated for what will come to be known as *Gaudin* error. *See e.g., United States v. Mitchell*, 867 F.2d 1232 (9th Cir. 1989) (deeming *McNally* fully retroactive and applying it on collateral review to vacate final convictions); *see also Chambers v. United States*, No. 93-55780, slip op. 4045 (9th Cir. Apr. 25, 1994) (giving habeas petitioner benefit of retroactive application of *United States* v. X-*Citement Video, Inc.*, 982 F.2d 1285 (9th Cir. 1992), which struck down 18 U.S.C. § 2252 as unconstitutional).

Then there are those defendants who've finished serving sentences for false statement offenses but remain under a legal disability. If they're still on probation, they meet the in custody requirement and can challenge the conviction under section 2255. *See Jones v. Cunningham*, 371 U.S. 236 (1963). Even if they're no longer in custody for the false statement offense, they may have other grounds to attack that conviction: For instance, if a defendant's sentence for a subsequent offense is enhanced because he was previously convicted of a false statement crime, he may be able to attack the prior conviction once he is in custody for the subsequent crime. *See Maleng v. Cook*, 490 U.S. 488, 493 (1989); *Feldman v. Perrill*, 902 F.2d 1445, 1447-49 (9th Cir. 1990).[13]

Finally, there are those defendants who, though no longer in custody for a false statement or related offense, may still suffer collateral consequences from their convic-

---

[13] An exception to this rule, recently articulated by the Supreme Court, is that defendants in federal sentencing proceedings generaly may not collaterally attack prior state convictions used to enhance their sentence under the Armed Career Criminal Act, 18 U.S.C. § 924(e), unless the challenge is based on the Sixth Amendment right to counsel. *See Custis v. United States*, 1994 WL 197074 (U.S. May 23, 1994).

tions—such as not being able to engage in certain businesses, vote, hold public office or serve as jurors. *Maleng*, 490 U.S. at 491-92 (1989). Even these defendants may find their way to court. They might, for example, file a writ coram nobis, which "is available to challenge the validity of a conviction, even though the sentence has been fully served." *Hirabayashi v. United States*, 828 F.2d 591, 604 (9th Cir. 1987).[14] Because this writ is normally used to correct errors of fact, *United States v. Mayer*, 235 U.S. 55, 69 (1914), these claimants may well rely on the majority's ruling that materiality is an issue of fact that was never resolved against them by a jury.

Conclusion

The majority opinion wreaks havoc with the administration of the federal criminal laws in this circuit. It refuses to be bound by Supreme Court authority and shrugs off the wisdom of every other federal court of appeals. Its effect will be felt for many years. Because the reasons advanced by the majority don't justify this major disruption, I respectfully dissent.

---

[14] Though Fed. R. Civ. P. 60(b) abolished this writ in civil cases, the writ is still available in criminal cases. *United States v. Morgan*, 346 U.S. 502, 505 n.4 (1954); *Hirabayashi*, 828 F.2d at 604.

APPENDIX B

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 90-30334

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MICHAEL E. GAUDIN, DEFENDANT-APPELLANT

Argued and Submitted Oct. 7, 1991
Submission Withdrawn Oct. 25, 1991
Resubmitted June 19, 1992
Opinion Filed Feb. 18, 1993
Opinion Withdrawn June 22, 1993
Decided June 22, 1993

Appeal from the United States District Court for the District of Montana

---

ORDER

Before: WALLACE, Chief Judge, HUG, and RYMER, Circuit Judges.

The opinion filed February 18, 1993, 986 F.2d 1267, is withdrawn.

HUG, Circuit Judge:

This case involves an alleged scheme in which Gaudin purchased houses, then entered into sham sales transactions at inflated appraised prices, obtained loans on the basis of the inflated prices, reacquired the property, rented it, failed to make the mortgage payments, and applied the rents to his own use. He was convicted of equity skimming, a violation of 12 U.S.C. § 1709-2, for his failure to pay the HUD/FHA insured mortgages while retaining the rents on the secured properties and applying them to his own use. He was also convicted of 43 counts of violations of 18 U.S.C. § 1001 for false statements made on the loan documents submitted.

The issue on the equity skimming charge is whether sufficient evidence was adduced to sustain the conviction. The principal issue on the false statement counts is whether the district court erred in instructing the jury that one of the elements of the crime, the materiality of the statements, was established as a matter of law. Because we reverse these 43 counts on this issue, we need not address the other claimed evidentiary and instructional errors involving those counts. We find sufficient evidence to sustain the equity skimming charge and affirm the conviction on that count.

I. *Facts*

Michael Gaudin, a real estate broker and developer, and two real estate appraisers were charged in a multi-count indictment on October 19, 1989, based on a series of real estate transactions involving loans insured by the United

States Department of Housing and Urban Development ("HUD") through the Federal Housing Administration ("FHA"). Count 1 charged Gaudin with equity skimming in violation of 12 U.S.C. § 1709-2. Counts 2-42 charged him with making or causing to be made false entries on HUD settlement statements in violation of 18 U.S.C. § 1001. Counts 43-46 charged Gaudin and the appraisers with making false statement on HUD appraisal forms. The appraisers were tried separately. Count 18 was dismissed, and Gaudin was convicted by a jury on all remaining counts. Count 43 was dismissed at sentencing for insufficient evidence. Gaudin's motion for a new trial was denied; he was sentenced to 36 months in prison on Count 1, and 10 months in prison on each of the other counts, all sentences to run concurrently.

The charges arose from a series of transactions from December 31, 1985 through December 1, 1988. Gaudin purchased 29 single family homes with loans secured by deeds of trust and mortgages insured through FHA. Within one year of the dates of purchase, the loans went into default.

Gaudin did business as Hallmark Properties, Montana Regency, Inc., and North West Housing, Inc. He renovated and resold rental housing. He presented borrowers with complete loan packages to United Western Mortgage Company, which participated in FHA's direct endorsement program. The loan packages contained purchase and sale agreements, appraisal reports, promissory notes, trust indentures, settlement statements, and letters from each borrower certifying that no portion of any equity payment would be refunded. Sixty-two such transactions occurred.

Gaudin, or one of his companies, was the original owner of the real estate involved in each transaction. The

Government's case was based on evidence that Gaudin was in effect selling property to himself at an artificially inflated price based on inflated appraisals. These sales and appraisals were then used to obtain loans that exceeded the real value of the property. Gaudin solicited friends and relatives to act as buyers, to whom he paid $1,000 each to buy a house from him or from one of his companies. In most of the transactions, the buyers made the necessary down payments by making an equity transfer of a fractional interest in the buyer's own home, by deeding the interest to Gaudin, who promptly deeded it back to the buyer. Several buyers made cash down payments but were assured that the cash would be returned immediately. Gaudin paid all costs of loan origination and closing. The mortgage company funded the loan based upon the representations made on the settlement sheets, which were forwarded to FHA/HUD, who insured the loans.

No loan payments were made by the buyers. The equity payments were refunded, and Gaudin assumed the loans, took title in a name other than the name under which he originally owned the property, rented the houses, collected rent, and subsequently defaulted on 29 loans insured by HUD/FHA. The total gross sale price of the properties sold by Gaudin and then assumed back was $2,003,700. Gaudin netted $982,003, according to the Government, and retained title to the properties.

At trial, Gaudin claimed that the $1,000 payments were for the right to repurchase the properties and to assume the FHA loans. Not all of the loans made were assumed by Gaudin. When the mortgage company discovered in April 1987, that Gaudin had assumed many of the loans, it terminated all of Gaudin's financing. Gaudin then defaulted on the loans. Although he continued to collect between $6000 and $8000 per month in rent from 29 of the proper-

ties until December 31, 1988, he made no payments on the loans.

The false statements charges in Counts 2-42 were based upon the representations made on line 303 of the HUD-1 settlement statements prepared in each transaction. Line 303 shows the amount of cash paid "to" or "from" the borrower to close the loan. The Government contended that the amount represented as being paid "from" the borrower affected the mortgage company's determination of the amount of the loan, and the decision of HUD/FHA to insure the loan. It concealed the true nature of the transaction and Gaudin's part in it.

Counts 44-46 were based upon evidence that Gaudin and an appraiser made false statements on HUD Forms 92800, Appraisal Report Forms, by overstating the fair market value of properties, in violation of 18 U.S.C. § 1001.

II. *Equity Skimming*

The only error alleged in connection with the equity skimming count was that there was insufficient evidence to support the verdict of the jury.[1] The crime charged is a violation of 12 U.S.C. § 1709-2 (1988). That statute provides in pertinent part as follows:

---

[1] The appellant also raised two issues on appeal that he contends relate to all charges: (1) the failure to give a requested instruction that good faith reliance on Government regulations constituted a defense, and (2) that the admission of some expert testimony and the reference to appellant's activities as "straw buyer" transactions was error. These issues actually pertain only to the false statement charges discussed in part III. There is no evidence that Gaudin relied on Government regulations in violating the equity skimming statute. The expert opinion testimony and the "straw buyer" reference only concerned the false statement charges. We do not reach these issues because we reverse the false statement charges on other grounds.

> Whoever, with intent to defraud, willfully engages in a pattern or practice of—
>
> (1) purchasing one- to four-family dwellings . . . which are subject to a loan in default at time of purchase or in default within one year subsequent to the purchase and the loan is secured by a mortgage or deed of trust insured or held by the Secretary of Housing and Urban Development or guaranteed by the Department of Veterans' Affairs, or the loan is made by the Department of Veterans' Affairs,
>
> (2) failing to make payments under the mortgage or deed of trust as the payments become due, regardless of whether the purchaser is obligated on the loan, and
>
> (3) applying or authorizing the application of rents from such dwellings for his own use,
>
> shall be fined not more than $250,000 or imprisoned not more than 5 years, or both.

There is evidence that shows that Gaudin collected between $6,000 and $8,000 per month in rent from April 1987 until December 1988. Although there is evidence he continued to make payments on some of his mortgages, it is undisputed he made no payments after April 1987 on the 29 mortgages here in issue. The Government presented evidence that the rent proceeds from those 29 properties were used to pay for repairs and improvements, taxes, and mortgage payments on other loans. Some "surplus funds" were also identified.

Gaudin claims that the Government failed to prove that he applied the rent receipts to his own use. He asserts that his financial records show that none of the money was

spent on anything other than expenses directly related to the mortgage property. He argues that because his records show that he used all the rents for upkeep and to make mortgage payments until his financing was terminated in April 1987, he is not guilty of equity skimming. Applying the rent proceeds to payments on other mortgages, to taxes, and to capital improvements on these and other houses, while making no mortgage payments from April 1987 to December 1988, is strong evidence of equity skimming. This evidence, viewed in the light most favorable to the Government, is sufficient to uphold the conviction.

III. *False Statements*

We next turn to the charges involving the false statements, in violation of 18 U.S.C. § 1001 (1988). 18 U.S.C. § 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

An element of the false statements statute, 18 U.S.C. § 1001, is materiality. *United States v. Oren,* 893 F.2d 1057, 1063 (9th Cir.1990); *United States v. Facchini,* 874 F.2d 638, 641 (9th Cir.1989) (*en banc*). Materiality is defined as the "propensity to influence agency action." *United States v. Vaughn,* 797 F.2d 1485, 1490 (9th Cir.1986) (citation omitted). The false statement must have "the intrinsic capability of *influencing or affecting*

the agency's or department's decision." *Facchini,* 874 F.2d at 643 (citation omitted). The materiality of a section 1001 false statements must be determined by the jury. *United States v. Valdez,* 594 F.2d 725, 729 (9th Cir.1979).

The district court instructed the jury that the statements charged in the indictments were material as a matter of law. This was error.[2] The defendant, however, did not object to the instruction at the time of trial. When a defendant has failed to object to an instruction, we review for plain error. *United States v. Kessi,* 868 F.2d 1097, 1102 (9th Cir.1989). "Plain error is highly prejudicial error affecting substantial rights, and is found only in exceptional circumstances. It must be highly probable that the error materially affected the verdict," *Id.* at 1102-03 (citations omitted).

Although the plain error requirement has been characterized in some cases as a procedural threshold to determine reviewability, in actuality it is a substantive standard to determine the significance of the error. It is an error that is so significant to the fairness of the trial that we will reverse, despite the fact that no adequate objection was made at trial. In *United States of America v. Hoac and Chan,* 990 F.2d 1099 (1993), we discussed the relationship of plain error to harmless error and noted that if an error is plain error it cannot be harmless. 990 F.2d at 1109. The plain error rule is the more restrictive standard. This logically follows from the requirements of orderly trial procedure. If an error occurs and it is properly objected to, the trial court has an opportunity to correct it. A failure to do so is then reviewed on appeal under the

[2] The Government contends that we should depart from our holding in *Valdez* that materality is a question of fact. This panel, of course, is bound by the holding of *Valdez.*

harmless error standard. If no objection is made, and the trial court has no opportunity to correct the error, more is required before the error will justify reversal.

The Government argues that even if the failure to submit the materiality question to the jury was error it was harmless error, as we held in *Valdez*, 594 F.2d at 729. With this prior precedent it is logical to discuss the harmfulness of the error first. The plain error determination overlaps the harmless error determination. The harmfulness of an error must necessarily be considered in order to determine if the error is plain error justifying reversal, because if an error is harmless, it cannot be plain error. *Hoac and Chan,* 990 F.2d at 1109.

In *Valdez,* in determining harmless error, we viewed the overwhelming nature of the evidence of whether the materiality of the statements was so clearly established that the failure to submit the issue to the jury was harmless beyond a reasonable doubt. 594 F.2d at 729. Recent Supreme Court opinions have caused us to reexamine the basis for this harmless error analysis. In *Martinez v. Borg,* 937 F.2d 422, 424-25 (9th Cir.1991), we adopted the analysis set forth by Justice Scalia in his concurring opinion in *Carella v. California,* 491 U.S. 263, 271, 109 S.Ct. 2419, 2423, 105 L.Ed.2d 218 (1989). As we noted in *Martinez,* this analysis was later refined in *Yates v. Evatt,* ____ *U.S.* ____, *111 S.Ct. 1884, 114 L.Ed.2d 432 (1991).* The *Yates* case is, of course, somewhat different from the case at hand, in that it dealt with the application of a mandatory rebuttable presumption. However, it is apparent from that decision that the reviewing court must identify which facts the jury considered under the instructions of the court on the pertinent issue in reaching its verdict. The opinion holds that the reviewing court must look to the evidence available to the jury "and presumably considered by the jury in accordance with the instructions" on that

issue to determine if it is so overwhelming as to leave no reasonable doubt. *Id.*, ____ U.S. at ____, 111 S.Ct. at 1893.[3] Under *Yates,* in determining harmless error, we may not consider all of the record evidence; we are confined to the evidence that a reasonable juror would have considered under the instructions that were given in arriving at a determination that an essential element of the crime had been proved beyond a reasonable doubt. ____ U.S. at ____, 111 S.Ct. at 1894. Under the guidance of *Yates,* we may no longer consider the strength of the evidence and determine whether it is so clear that the jury *would have* found the element to exist had it been properly instructed, but we must determine whether the jury was actually able to consider that evidence under the instructions of the court.

Therefore, it is apparent that when an element of the crime has been completely removed from the jury's determination, there can be no inquiry into what evidence the jury considered to establish that element, because the jury

---

[3] Justice Souter noted that when the issue involves an unconstitutional presumption that is necessary to establish the element of the crime, the appellate court must look to the facts considered in determining whether to apply the presumption. If the presumption is not itself necessary to establish the element of the crime, but only one of a variety of facts sufficient to prove the necessary element, then the other evidence sufficient to prove the element should be identified. *Id.*, ____ U.S.. at ____ n.9, 111 S.Ct. at 1893 n. 9. If the evidence thus identified under either alternative, and "presumably considered by the jury in accordance with the instructions," is "so overwhelming as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of the presumption," then the error could be held to be harmless beyond a reasonable doubt. *Id.*, ____ U.S. at ____ __ ____, 111 S.Ct. at 1893-94. In either case, it is necessary to demonstrate that the jury could have actually considered that evidence in its determination that the element of the crime was established.

was precluded from considering the element at all. The fact that evidence existed, which the jury *could have considered* on the issue of materiality, had the issue been submitted to the jury under an appropriate instruction, is of no moment, because the jury was instructed not to consider the evidence as to materiality. Thus, simply stated under *Yates,* when an element of the crime that must be found by the jury is removed from jury consideration, that error cannot be harmless.[4]

Since the error is not harmless, we must then determine if it rises to the level of plain error. The Supreme Court has stated that in order to constitute plain error, the error must not only affect substantial rights, but also must have had "an unfair prejudicial impact on the jury's deliberations." *United States v. Young,* 470 U.S. 1, 16-17 n. 14, 105 S.Ct. 1038, 1047 n. 14, 84 L.Ed.2d 1 (1985). In this case an essential element of the crime was completely removed from the consideration of the jury and thus the jury had no opportunity to deliberate on that issue.

The state has the burden of proving every element of a crime beyond a reasonable doubt. *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970). When a trial judge deprives the jury of its fact-finding duty, this violates the defendant's due process rights. *Carella*, 491 U.S. at 265, 109 S.Ct. at 2420; *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). We found it to be constitutional error when an element of the offense charged was omitted from the jury in-

---

[4] The Government argues that the jury's verdict indicated that Gaudin acted with the intention of influencing the agency and that the facts necessary to establish intent also necessarily established materiality. First, we observe that facts bearing on intent would not necessarily bear on the materiality issue. Even more important, the jury did not, as required by *Yates,* consider those facts under an appropriate instruction in determining the element of materiality, because that issue was removed from the jury's consideration.

structions in *Martinez*, 937 F.2d at 423. As in the *Martinez* case, the jury in this case was deprived of its fact-finding duty because the trial judge withdrew the element of materiality from the jury and stated that it existed as a matter of law. For the same reasons expressed in *Martinez*, this violated the defendant's due process rights. This error "seriously affected the fairness" of the proceedings, *see Young*, 470 U.S. at 15, 105 S.Ct. at 1046, and constitutes plain error.

IV. *Conclusion*

Because the element of materiality was removed from jury consideration for the crimes charged in Counts 2-17, 19-42, and 44-46, the convictions on these counts must be reversed. Because of the reversal on this ground, we need not address the other issues raised as to those counts. In the appellant's brief on appeal, sufficiency of the evidence was identified as an issue only in the equity skimming charge. In the body of the brief, however, some discussion exists with regard to the sufficiency of the evidence concerning these counts under section 1001. Our review of the evidence indicates that the evidence was clearly sufficient for a conviction on these counts, had the jury been properly instructed on the issue of materiality.

The conviction on Count 1, equity skimming, is AFFIRMED. The convictions on Counts 2-17, 19-42, and 44-46 are REVERSED and REMANDED for further proceedings in accordance with this opinion.

U.S. GOVERNMENT PRINTING OFFICE: 1994 – 301-157/86200

Supreme Court, U.S.
FILED
NOV 23 1994
OFFICE OF THE CLERK

No. 94-514

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL E. GAUDIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-514

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL E. GAUDIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Respondent does not oppose our petition, which seeks review of the question whether, in a prosecution under 18 U.S.C. 1001 for making false statements within the jurisdiction of a federal agency, the materiality of those statements is an issue to be resolved by the court rather than the jury. To the contrary, respondent agrees, in a cross-petition filed in No. 94-6571, that that question "merits this Court's consideration to reexamine this important federal constitutional question over which the courts of appeal are now irreconcilably split." 94-6571 Cross-Pet. 13.*

---

* Our arguments for denial of the cross-petition are set forth in a separate brief in opposition filed in that case.

1. Respondent admits that the Ninth Circuit's holding on the materiality issue "conflict[s] with all other United States Courts of Appeal." 94-6571 Cross-Pet. 8. Respondent states, however, that the Ninth Circuit's holding accords with the decisions of some state courts. *Id.* at 10-11, citing *State* v. *Anderson*, 603 A.2d 928, 935 (N.J. 1992) (dictum); *People* v. *Hedgecock*, 795 P.2d 1260, 1266-1268 (Cal. 1990); *Commonwealth* v. *McDuffee*, 398 N.E.2d 463, 467-470 (Mass. 1979). The state court decisions, of course, do not involve the federal false statement statute; instead, many concern the materiality element of state perjury statutes. See Annotation, *Materiality of Testimony Forming Basis of Perjury Charge as Question for Court or Jury in State Trial*, 37 A.L.R.4th 948, 953-958 (1985). Because many of those state-court decisions are founded upon interpretation of the federal Constitution, however, this Court's resolution of the question presented in our petition should eliminate confusion among the state courts as well as the federal courts.

2. Respondent argues that this Court's decision in *Sinclair* v. *United States*, 279 U.S. 263, 284-285 (1929), has been superseded by more recent decisions of this Court holding that the right to a jury trial applies to every fact necessary for conviction. 94-6571 Cross-Pet. 12-13. That argument incorrectly assumes that materiality is a question of fact. As explained in our petition (Pet. 10-12), *Sinclair* and *Kungys* v. *United States*, 485 U.S. 759 (1988), teach that materiality is an issue to be decided by the court because it is an issue of law. See *Kungys*, 485 U.S. at 772; *Sinclair*, 279 U.S. at 298-299.

Respondent asserts that *Kungys* is inapposite because it involved a civil denaturalization proceeding. 94-6571 Cross-Pet. 10-11. He does not explain, however, why

materiality should be deemed a question of law in civil cases but a question of fact in criminal cases. This Court has never suggested that the classification depends on whether the underlying proceeding is civil or criminal. *Kungys*'s reaffirmation of *Sinclair* is therefore fully instructive here. See Pet. 10-11.

* * * * *

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

DREW S. DAYS, III
Solicitor General

NOVEMBER 1994

(5)

No. 94-514

Supreme Court, U.S.
FILED
FEB 21 1995

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL E. GAUDIN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

RICHARD HANSEN
ALLEN, HANSEN & MAYBROWN
1001 Fourth Ave.
Number 4301
Seattle, Washington 98154
(206) 447-9681
Counsel of Record
for Respondent

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217
Counsel of Record
for Petitioner

PETITION FOR WRIT OF CERTIORARI FILED SEPTEMBER 16, 1994
CERTIORARI GRANTED JANUARY 6, 1995

BEST AVAILABLE COPY

41pp

TABLE OF CONTENTS

	Page
Relevant District Court Docket Entries	1
Relevant Court of Appeals Docket Entries	8
Indictment	11
Relevant Jury Instructions	18
Judgment and Commitment	31
Order Granting Certiorari	39

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

Docket No. CR-89-34-M-PGH

UNITED STATES OF AMERICA, PLAINTIFF

v.

MICHAEL E. GAUDIN, DEFENDANT

RELEVANT DOCKET ENTRIES

DATE	No.	PROCEEDINGS
10/19/89	1	CRIMINAL COVER SHEET
	2	INDICTMENT
	—	ENT REC OF GJ concurring in GF. Case assigned to Mssla Div. C/S ordered & issued. Orig sms, 2 cpys & 2 cpys of Indict to USM/GF, cpys to USM/Blgs, AUSA, USPO (arraign set for 11-1-89 @ 10:00 a.m. w/Magistrate Whelan in Butte.
10/25/89	—	C/S issued setting arraign for 11-16-89 @ 10:00 a.m. before Magistrate Larson in Missoula. Orig & 2 cpys & 2 crt cpys of Indict (w/Magistrate entry on last page omitted) hnd'd to USM/Hlna.
10/31/89	4	Filed ORDER that the caption on the indictment be changed frm Butte Div to Msla Div. cpys mailed USA Hlna
10/25/89	3	Filed USA Mot to correct indicement caption.
11/3/89	5	orig CRIM SUMMONS iss'd 10-19-89 ret'd unserved.

DATE	No.	PROCEEDINGS
11/6/89	—	Ent rec of arraignmnt bef Mag. Larson @ Mssla; Tammy Stuckey, RPR. Deft pt w/ atty Moses who adv's Crt both he & Mr. Goff will be representing deft. Deft swn & exam'd by Crt—understnds proceedings & all rts—has rd indictmnt & understnds chgs & penalties—waives rding. Pleads: not guilty to ea & all 46 counts. Trial set for 12-18-89 @ 9:30 in Hlna. PT Mtns due in 10 days. U.S. recs OR w/stand conditions —deft to be processed by U.S.M. & PT Svcs & then released on OR. Crt rpr's notes retained in Mssla.
"	6	ORDER SETTING CONDITIONS OF RELEASE—cpys to deft, AUSA, U.S.M., PTS.
11/7/89	—	FILE & DOC SHEET TO HLNA frm Mssla.
11/8/89	7	SUMMONS issued to deft Gaudin returned as served 11-1-89 at Roberts Realty in Victor, MT.
1/9/89	8	NOTICE OF APPEARANCE AS CO-CNSL on behalf of deft by Robert Goff of Church, Harris, Johnson & Wms.
11/14/89	9	ORDER—Judge Lovell recuses himself from this case. The clerk is directed to notify cnsl of the entry of this order & to forward the file to Chief Judge James F. Battin for reassignment. Copies to Larsen, Msla Clerk, Cummings, Moses, Goff, CCL, Tami. ds for gr
		* * * *
(9) 11/20/89	14	ORDER—this case is reassigned to Hon. Paul G. Hatfield. Copies to Cummings, McLean, McLean, CCL, Tami, Goff.
		* * * *

DATE	No.	PROCEEDINGS
12/7/89	—	ENT REC OF CRT PROCEEDINGS/Evid hrg on PT Mtns: Crt, AUSA/Darragh, deft cnsl/Moses & Cummings & deft Bottelson present. Deft cnsl Moses' argmt re Gaudin's mtns to dismiss, for bill of particulars & for severance re Cnts 43-46. Deft cnsl Cummings' argmt re PT mtns for severance re Payne & Bottelson, AUSA'S resp. Deft cnsl Moses' further argument. Deft cnsl Cummings' further argmt. AUSA'S resp. Deft cnsl Moses' mtns to move trial to GF or Msla, for joinder of Cnt 1 w/Cnts 2-42 & for USA to explain/clarify allegations in Cnts 2-42. AUSA'S resp. Crt & cnsl discuss trial dates. Crt orders cnsl confer by 12/22/89 & file PT mtns by 1/2/90; jury instr due 1/8/90; jury trial 2/5/90 at 9:30 AM in GF. Crt takes PT mtns under advisement 2:35 Crt adjourns
12/8/89	17	ORDER: 1/deft Bottelson shall be tried separately on Cnt 43 on 12/19/89 at 9:30 AM in GF as case #1; 2/deft Payne shall be tried separately on Cnts 43-46 on 12/19/89 at 9:30 AM in GF as case #2; 3/trial of Gaudin set on 12/18/89 is VACATED & cont to 2/12/90 at 9:30 AM in GF. Cpys to cnsl/3, USM, USPO
		* * * *
12/8/89	19	Pltf's Proposed Instructions [cpy for crt]
		* * * *
01/08/90	28	Deft. Gaudin Mtn. to Give Jury Insts.—w/c/s. [Called for cpy.]
		* * * *
4/23/90	—	ENT REC OF CRT PROCEEDINGS/JURY SELECTION & JURY TRIAL DAY 1:
		* * * *

DATE	No.	PROCEEDINGS
4/23/90	51	JURY LIST w/peremptory challenges
4/24/90	—	ENT REC OF CRT PROCEEDINGS/DAY 2 OF JURY TRIAL:
		* * * *
4/25/90	—	ENT REC OF CRT PROCEEDINGS/ DAY 3 OF JURY TRIAL:
		* * * *
4/26/90	—	ENT REC OF CRT PROCEEDINGS/DAY 4 of JURY TRIAL:
		* * * *
4/27/90	—	ENT REC OF CRT PROCEEDINGS/DAY 5 OF JURY TRIAL:
		* * * *
4/30/90	—	ENT REC OF CRT PROCEEDINGS/DAY 6 OF JURY TRIAL:
		* * * *
5/1/90	—	ENT REC OF CRT PROCEEDINGS/DAY 7 OF JURY TRIAL:
		* * * *
5/2/90	—	ENT REC OF CRT PROCEEDINGS/DAY 8 OF JURY TRIAL:
		* * * *
5/3/90	—	ENT REC OF CRT PROCEEDINGS/DAY 9 OF JURY TRIAL:
		* * * *
5/4/90	—	ENT REC OF CRT PROCEEDINGS/DAY 10 OF JURY TRIAL:
		* * * *
5/7/90	—	ENT REC OF CRT PROCEEDINGS/DAY 11 OF JURY TRIAL:
		* * * *
5/8/90	—	ENT REC OF CRT PROCEEDINGS/DAY 12 of JURY TRIAL:

DATE	No.	PROCEEDINGS
5/9/90	—	ENT REC OF CRT PROCEEDINGS/DAY 13 OF JURY TRIAL:
		* * * *
5/9/90	59	CRT'S FINAL INSTRUCTIONS
		* * * *
5/9/90	62	VERDICT [guilty all cnts]
		* * * *
5/17/90	70	ORDER: Deft's mtn for new trial is denied. Cpys to cnsl/2, USM, USPO w/c/clk
		* * * *
08/27/90	—	Entered Record of Crt. Proceedings; Sentencing; Anne Perron crt. rptr; At 3:03 p.m., w/crt., AUSA/McLean deft. in person w/ ret. cnsl. Stephen Moses & Jay Lansing, & USPO/Watters present. Jay Lansing gave oral argument in re to deft.'s memo. that the actions in ct.'s 2-46 should not be included in sentencing guidelines w/cnt. 1 as it is double jeopardy. Crt. ordered that deft.'s obj.'s & arguments are overruled, all defense mtns, under advisement are DENIED. Ct. 43 of indict is DISMISSED. Moses' stmt. & recommendations to crt. in re to sent. McLean's stmt. & recommendations to crt. in re to sentencing. Moses responses to McLean's stmts. Crt. ordered that deft. be committed to csty. of BOP for a term of 36 mos. on Ct. I. Deft. committed to csty. of BOP on remaining ct.'s w/exceptions of Ct.'s 18 & 43 which have been dismissed to a total of 10 mos., each ct. 2-17, 19-42, 44-46 to run concurrently. Upon release deft. placed on 3 yrs. super. release, to comply w/standard conditions of USPO. Add. condition that deft. co-operate w/the

DATE	No.	PROCEEDINGS
		selling of any real estate remaing. Deft. to make restitution in amt.'s & to whom, to be determined by cnsl. & USPO. Deft. to pay CVF amt. of $50.00 each cnt. for total of $2,200.00. Deft.'s mtn. that deft. ramin out on present bond pending appeal. McLean's obj.'s to same & requests deft. be remanded to csty. of U.S.M. Crt. ordered deft.'s cnsl. wi/48 hrs brief issue of remaining out on bond pending appeal & McLean 48 hrs. to reply. Crt. takes matter under advisement. 3:39 p.m., crt. in recess.
08/27/90	—	CONFIDENTIAL PRESENTENCE REPORT [left side of file]
		* * * *
09/04/90	79	Judgt. & Commitment; FILED & ENTERED IN CRIMINAL JUDGT. Docket Volume 32, Page 1906; Deft. committed to csty. of BOP to be imprisoned for term of 36 mos. on Ct. I. Csty. of BOP on each Ct. 2-17, 19-42, 44, 45, & 46 all to be served concurrently Upon release deft. placed on super. release for term of 3 yrs. each on Ct. 1-17, 19-42, 44, 45 & 46; all such terms run concurrently. WI/72 hrs. of release from csty of BOP, deft. report in person to USPO in district to which deft. is released. Deft. comply w/standard conditions of USPO & add. conditions: 1/ cooperate to accomplish the sale of any real estate remaining. 2/ Make restitution in amts. & to the various persons as determined by cnsl. & USPO.

DATE	No.	PROCEEDINGS
		3/ Pay CVF in amt. of $2,200.00—w/c/c/m to AUSA/Mclean cpy. & cert. cpy., Moses, Goff, USPO/2 cpys. USM/5 cert. cpys.
09/04/90	80	Transcript of Sentencing Hearing on 08/27/90—cpys. to USPO
		* * * *
9/6/90	81	Deft's NOTICE OF APPEAL; fee pd. @ Gt. Falls, Rec't #00488.
		* * * *
10/29/90	85 thru 95	TRANSCRIPTS ON APPEAL (11 volumes) filed by Lisa Lewis, RPR.
11/20/90	—	CERTIFICATE OF RECORD snt to C.C.A.

DATE	No.	PROCEEDINGS
		selling of any real estate remaing. Deft. to make restitution in amt.'s & to whom, to be determined by cnsl. & USPO. Deft. to pay CVF amt. of $50.00 each cnt. for total of $2,200.00. Deft.'s mtn. that deft. ramin out on present bond pending appeal. McLean's obj.'s to same & requests deft. be remanded to csty. of U.S.M. Crt. ordered deft.'s cnsl. wi/48 hrs brief issue of remaining out on bond pending appeal & McLean 48 hrs. to reply. Crt. takes matter under advisement. 3:39 p.m., crt. in recess.
08/27/90	—	CONFIDENTIAL PRESENTENCE REPORT [left side of file]
		* * * *
09/04/90	79	Judgt. & Commitment; FILED & ENTERED IN CRIMINAL JUDGT. Docket Volume 32, Page 1906; Deft. committed to csty. of BOP to be imprisoned for term of 36 mos. on Ct. I. Csty. of BOP on each Ct. 2-17, 19-42, 44, 45, & 46 all to be served concurrently Upon release deft. placed on super. release for term of 3 yrs. each on Ct. 1-17, 19-42, 44, 45 & 46; all such terms run concurrently. WI/72 hrs. of release from csty of BOP, deft. report in person to USPO in district to which deft. is released. Deft. comply w/standard conditions of USPO & add. conditions: 1/ cooperate to accomplish the sale of any real estate remaining. 2/ Make restitution in amts. & to the various persons as determined by cnsl. & USPO.

DATE	No.	PROCEEDINGS
		3/ Pay CVF in amt. of $2,200.00—w/c/c/m to AUSA/Mclean cpy. & cert. cpy., Moses, Goff, USPO/2 cpys. USM/5 cert. cpys.
09/04/90	80	Transcript of Sentencing Hearing on 08/27/90—cpys. to USPO
		* * * *
9/6/90	81	Deft's NOTICE OF APPEAL; fee pd. @ Gt. Falls, Rec't #00488.
		* * * *
10/29/90	85 thru 95	TRANSCRIPTS ON APPEAL (11 volumes) filed by Lisa Lewis, RPR.
11/20/90	—	CERTIFICATE OF RECORD snt to C.C.A.

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Docket No. 90-30334

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MICHAEL E. GAUDIN, DEFENDANT-APPELLANT

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
	* * * *
9/27/90	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Filed in D.C. on 9/4/90.; setting schedule as follows: transcript shall be ordered by 9/27/90 for Michael E. Gaudin; transcript shall be filed by 10/29/90; appellants' briefs, excerpts due by 12/10/90 for Michael E. Gaudin; appellees' brief due 1/9/91 for USA; appellants' reply brief due by 1/23/91 for Michael E. Gaudin. (RT required: yes.) (Sentence imp: 36 months.) [90-30334] (jhc) [90-30334]
	* * * *
10/7/91	ARGUED AND SUBMITTED TO J. C. WALLACE, Proctor R. HUG, Pamela A. RYMER [90-30334] (er) [90-30334]
	* * * *
10/25/91	Filed order (J.C. WALLACE, Proctor R. HUG & Pamela A. RYMER) the parties are directed to file simultaneous supplemental briefs addressing the question of harmless error. The briefs shall not exceed 15 pages and shall be filed within 21 days of the date of the filing of this order. Submission of this case is withdrawn pending the receipt of the briefs. [90-30334] (jr) [90-30334]
	* * * *

DATE	PROCEEDINGS
6/22/92	Filed order (J. C. WALLACE, Proctor R. HUG, Pamela A. RYMER): This case is hereby resubmitted effective 06/19/92. [90-30334] (sm) [90-30334]
	* * * *
2/18/93	FILED OPINION: AFFIRMED in part, REVERSED in part and REMANDED. (Terminated on the Merits after Oral Hearing; Affirmed (in part) and Reversed (in part) and Remanded; Written, Signed, Published. J. C. WALLACE; Proctor R. HUG, author; Pamela A. RYMER) FILED AND ENTERED JUDGMENT. [90-30334] (sm) [90-30334]
	* * * *
6/22/93	Filed order (J. C. WALLACE, Proctor R. HUG, Pamela A. RYMER): The opinion filed 02/18/93 is withdrawn. [90-30334] (sm) [90-30334]
6/22/93	OPINION FILED (J. C. WALLACE, Proctor R. HUG, Pamela A. RYMER): The conviction on Count 1, equity skimming, is AFFIRMED. The convictions on Courts 2-17, 19-42, and 44-46 are REVERSED and REMANDED for further proceedings in accordance with this opinion. [90-30334] (sm) [90-30334]
	* * * *
9/16/93	Filed order (J. C. WALLACE): Upon the vote of a majority of nonrecused regular active judges of this court, it is ordered that this case be reheard by the en banc court pursuant to Circuit [R]ule 35-3. [90-30334] (sm) [90-30334]
	* * * *
11/18/93	ARGUED AND SUBMITTED TO J. C. WALLACE, Proctor R. HUG, Thomas TANG, Betty B. FLETCHER, Stephen R. REINHARDT, Robert R. BEEZER, Alex KOZINSKI, Edward LEAVY, Pamela A. RYMER, Thomas G. NELSON, Andrew J. KLEINFELD [90-30334] (ml) [90-30334]
	* * * *

DATE	PROCEEDINGS
6/21/94	OPINION FILED (J. C. WALLACE, Procter R. HUG, Author, Thomas TANG, Betty B. FLETCHER, Stephen R. REINHARDT, Robert R. BEEZER, Alex KOZINSKI, Dissenting, Edward LEAVY, Pamela A. RYMER, Thomas G. NELSON, Andrew J. KLEINFELD): We confirm our prior authority that the issue of materiality in charges under 18 U.S.C. 1001 must be submitted to the jury under appropriate instructions. Therefore, in conformity with the panel opinion, the conviction of Count 1, equity skimming is AFFIRMED. The convictions on Counts 2-17, 19-42, and 44-46 are REVERSED and REMANDED for further proceedings in accordance with the opinion of this court. [90-30334] (sm) [90-30334]
	* * * *
8/12/94	MANDATE ISSUED [90-30334] (ah) [90-30334]
9/26/94	Received notice from Supreme Court: petition for certiorari Supreme Court No. 94-514 filed on 9/19/94. [90-30334] (mhf) [90-30334]
10/31/94	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 94-6571 filed on 10/21/94. [90-30334] (ah) [90-30334]
1/18/95	Filed Supreme Court order, certiorari denied on 1/9/95. [90-30334] (crw) [90-30334]
1/18/95	Received notice from Supreme Court, petition for certiorari SC 94-514 GRANTED on 1/6/95, limited to Question 1 presented by the Petition. [PANEL] (mlm) [90-30334]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

Case No. CR-89-18-BU-CCL

UNITED STATES OF AMERICA, PLAINTIFF

v.

MICHAEL E. GAUDIN,
d/b/a HALLMARK PROPERTIES;
MONTANA REGENCY, INC.;
NORTHWEST HOUSING, INC.,

and

ROBERT FORREST PAYNE, JR.

and

RUSSELL CARL BOTTELSON, JR.
DEFENDANT[S].

INDICTMENT

[Filed Oct. 19, 1989]

COUNT ONE

From on or about December 31, 1985 and continuing through on or about December 31, 1988 within the District of Montana, Michael Earl Gaudin doing business as Hallmark Properties, Montana Regency, Inc. and Northwest Housing, Inc. with intent to defraud knowing and willfully engaged in the following pattern and practice:

A. Michael Earl Gaudin d/b/a Hallmark Properties, Montana Regency, Inc. and Northwest Housing, Inc. pur-

chased approximately 29 single family dwellings the loans on which were secured by deeds of trust and mortgages and insured by the United States Secretary of Housing and Urban Development. Within one year of said real estate purchases the loans were in default.

B. That Michael Earl Gaudin d/b/a Hallmark Properties, Montana Regency, Inc. and Northwest Housing, Inc. knowingly failed to make payments under the mortgage or deed of trust of said residential dwellings as the payments came due.

C. That Michael Earl Gaudin d/b/a Hallmark Properties, Montana Regency, Inc. and Northwest Housing, Inc. rented the properties to various tenants and applied and authorized the application of rents from said dwellings in the approximate amount of $120,000 for his own use. All in violation of Title 12 U.S.C. § 1709-2.

COUNT TWO THROUGH FORTY-TWO

That on or about the date for each count listed below within the District of Montana, Defendant Michael E. Gaudin d/b/a Hallmark Properties, Montana Regency, Inc. and Northwest Housing, Inc. in a matter within the jurisdiction of the United States Department of Housing and Urban Development acting through the Federal Housing Administration did knowingly and willfully make or caused to be made a false writing and document knowing said writing and document contained false, fictitious and fraudulent statements and entries in that the Defendant Michael Earl Gaudin d/b/a Hallmark Properties, Montana Regency, Inc. and Northwest Housing, Inc. submitted and caused to be submitted to the United States in connection with the loan closing settlement of each of the District of Montana properties listed in the column entitled "Property" a "Settlement Statement" on which Michael Earl Gaudin d/b/a Hallmark Properties, Montana Regency, Inc. and Northwest Housing, Inc. represented that the borrower had made a cash payment at settlement of the dollar amount listed in the column entitled

"Settlement Sheet" whereas in truth and in fact as Defendant Michael E. Gaudin d/b/a Hallmark Properties, Montana Regency, Inc. and Northwest Housing, Inc. well knew the borrowers had made no actual cash payment and had in fact received a $1,000 payment from Michael Earl Gaudin for acting as a straw buyer:

Count	Date	Property	Settlement Sheet
Two	12/31/85	212 Higgins, Ave. Stevensville, MT 59870	$7,022.64
Three	03/20/86	450 Sixth Ave. Victor, MT 59875	6,860.19
Four	02/10/86	655 Sixth Ave. Victor, MT 59875	237.68
Five	02/10/86	309 DeSmet St. Hamilton, MT 59840	137.78
Six	01/15/86	514 Main St. Hamilton, MT 59480	7,229.90
Seven	02/13/86	709 North 7th St. Hamilton, MT 59840	696.75
Eight	02/13/86	601 & 602 1/2 N. 2nd St. Hamilton, MT 59840	537.73
Nine	02/02/86	849 Porter Hill Road Stevensville, MT 59870	158.83
Ten	03/11/86	208 Doran Lane Hamilton, MT 59840	7,708.81
Eleven	03/28/86	529 Folly Lane Stevensville, MT 59870	94.11
Twelve	3/24/86	523 Folly Lane Stevensville, MT 59870	122.61
Thirteen	03/24/86	535 Folly Lane Stevensville, MT 59870	31.07
Fourteen	03/28/86	545 Folly Lane Stevensville, MT 59870	383.46

Count	Date	Property	Settlement Sheet
Fifteen	05/14/86	295 First Street Corvallis, MT 59828	640.24
Sixteen	06/17/86	21 Meadow Lane Victor, MT 59875	846.39
Seventeen	07/22/86	175 N. Tudor Victor, MT 59875	524.40
Eighteen	08/29/86	675 Main Street Victor, MT 59875	1,820.10
Nineteen	12/09/86	NHN Pine Drive Victor, MT 59875	179.77
Twenty	07/31/86	705 21st St. North Great Falls, MT 59401	523.03
Twenty-One	07/31/86	144 Blake Street Victor, MT 59875	555.61
Twenty-Two	08/21/86	108 Second St. Alberton, MT 59820	191.54
Twenty-Three	08/19/86	908 Fourteenth Ave. S. Great Falls, MT 59405	740.84
Twenty-Four	08/13/86	210 16th St. North Great Falls, MT 59401	726.83
Twenty-Five	08/13/86	119 4th St. W. Cascade, MT 59421	659.54
Twenty-Six	10/17/86	709 35th Ave. N.E. Great Falls, MT 59401	416.39
Twenty-Seven	10/17/86	NHN 3rd Ave. S. and Main Street Belt, MT 59412	3,300.07
Twenty-Eight	11/06/86	126 4th St. W. Cascade, MT 59421	129.93
Twenty-Nine	11/12/86	921 3rd Ave. South Great Falls, MT 59401	400.76
Thirty	10/16/86	1320 11th Ave. S. Great Falls, MT 59401	375.36

Count	Date	Property	Settlement Sheet
Thirty-One	11/06/86	1524 4th Ave. N.W. Great Falls, MT 59401	91.83
Thirty-Two	12/01/86	301 12th St. North Great Falls, MT 59401	189.16
Thirty-Three	10/17/86	3209 3rd Ave. North Great Falls, MT 59401	369.13
Thirty-Four	11/13/86	1117 10th Ave. N. Great Falls, MT 59401	395.28
Thirty-Five	12/01/86	420 18th St. S. Great Falls, MT 59401	209.64
Thirty-Six	11/13/86	1308 2nd Ave. S. Great Falls, MT 59401	322.55
Thirty-Seven	12/02/86	415 Seventh St. Hamilton, MT 59840	171.31
Thirty-Eight	12/24/86	1020 2nd Ave. S.W. Great Falls, MT 59401	296.42
Thirty-Nine	01/28/87	518 1st Ave. S.W. Great Falls, MT 59404	321.44
Forty	01/05/87	1204 2nd Ave. South Great Falls, MT 59405	164.26
Forty-One	12/24/86	3221 6th Ave. North Great Falls, MT 59401	272.86
Forty-Two	12/30/86	721 8th Ave. South Great Falls, MT 59405	256.22

and by so representing Michael Earl Gaudin d/b/a Hallmark Properties, Montana Regency, Inc. and Northwest Housing, Inc. obtained approximately $1,013,046.00 in federally insured funds to which he was not entitled in violation of Title 18 U.S.C. § 1001.

COUNT FORTY-THREE

That on or about the 2nd day of September, 1986 within the State and District of Montana, Russell Carl Bottelson and Michael Earl Gaudin in a matter within

the jurisdiction of the United States Department of Housing and Urban Development acting through the Federal Housing Administration did knowingly and willfully make or cause to be made false, fictitious and fraudulent statement to be made on a residential appraisal report HUD Form 92800 in that Russell Carl Bottelson signed line 34A of said form certifying that he had carefully viewed the property described in the report when in truth and in fact as they then well knew the property described in the report had been viewed by Robert Forrest Payne, Jr. all in violation of Title 18 U.S.C. § 1001.

COUNT FORTY-FOUR

That on or about the 16th day of November, 1986 in the State and District of Montana the Defendants Robert Forrest Payne, Jr. and Michael E. Gaudin in a matter within the jurisdiction of the United States Department of Housing and Urban Development acting through the Federal Housing Administration did knowingly and willfully cause false, fictitious and fraudulent statements to be made on a residential appraisal report HUD Form 92800 in that Payne grossly overstated the fair market value of the subject property and further falsely represented the condition of the interior walls, floors and plumbing to be "good" when in truth and in fact as Payne and Gaudin then well knew the subject property had a fair market value of approximately $20,000 less than appraised by Payne and the walls, floors and plumbing were in very poor condition all in violation of Title 18 U.S.C. § 1001.

COUNT FORTY-FIVE

That on or about the 19th day of November, 1986 in the State and District of Montana the Defendants Robert Forrest Payne, Jr. and Michael E. Gaudin in a matter within the jurisdiction of the United States Department of Housing and Urban Development acting through the Federal Housing Administration did knowingly and will-

fully cause a false, fictitious and fraudulent statement to be made on a residential appraisal report HUD Form 92800 in that Payne grossly overstated the fair market value of the subject property to be $46,000 when in truth and in fact that Payne and Gaudin then well knew the fair market value of the property was $20,000 less than listed on the residential appraisal report all in violation of Title 18 U.S.C. § 1001.

COUNT FORTY-SIX

That sometime prior to February 14, 1987 in the State and District of Montana the Defendants Robert Forrest Payne, Jr. and Michael E. Gaudin in a matter within the jurisdiction of the United States Department of Housing and Urban Development acting through the Federal Housing Administration did knowingly and willfully cause a false, fictitious and fraudulent statement to be made on a residential appraisal report HUD Form 92800 in that Payne listed the fair market value of the subject property at $48,500 when in truth and in fact as Payne and Gaudin then well knew the actual fair market value of the subject property was approximately $12,000 all in violation of Title 18 U.S.C. § 1001.

A TRUE BILL.

/s/ Loraine Waters
Foreperson

/s/ [Illegible]
United States Attorney
For the District of Montana

[Clerk's seal omitted in printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

Docket No. CR-89-34-M-PGH

UNITED STATES OF AMERICA, PLAINTIFF

v.

MICHAEL E. GAUDIN, DEFENDANT

VOLUME XI

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE PAUL G. HATFIELD
UNITED STATES DISTRICT JUDGE, and a jury.

[May 7, 1990, 2:00 p.m.]

RELEVANT JURY INSTRUCTIONS

* * * * *

[2371] THE COURT: Members of the jury, now that you heard the evidence and the argument, it becomes my duty to give you the instructions of the court as to the law that applies in this case.

* * * * *

[2388] COUNTS TWO THROUGH FORTY-TWO of the Indictment in this case charge:

That on or about the date for each count listed below within the District of Montana, defendant Michael E. Gaudin d/b/a Hallmark Properties, Montana Regency, Inc. and Northwest Housing, Inc. in a matter within the jurisdiction of the United States Department of Housing and Urban Development acting through the Federal Housing Administration did knowingly and willfully make or caused to be made a false writing and document knowing

said writing and document contained false, fictitious and fraudulent statements and entries in that the defendant Michael Earl Gaudin d/b/a Hallmark Properties, Montana Regency, Inc. and Northwest Housing, Inc. submitted and caused to be submitted to the United States in connection with the loan closing settlement of each of the District of Montana properties listed in the column entitled "Property" a "Settlement Statement" on which Michael Earl Gaudin d/b/a Hallmark Properties, Montana Regency, Inc. and Northwest Housing, Inc. represented that the borrower had made a cash payment at settlement of the dollar amount listed in the column entitled "Settlement Sheet" whereas in truth and in fact as defendant Michael E. Gaudin d/b/a Hallmark Properties, Montana Regency, Inc. and Northwest Housing, Inc. well knew the borrowers [2389] had made no actual cash payment and had in fact received a $1,000 payment from Michael Earl Gaudin for acting as a strawbuyer:

Count	Date	Property	Settlement Sheet
Two	12/31/85	212 Higgins, Ave. Stevensville, MT 59870	$7,022.64
Three	03/20/86	450 Sixth Ave. Victor, MT 59875	6,860.19
Four	02/10/86	655 Sixth Ave. Victor, MT 59875	237.68
Five	02/10/86	309 DeSmet St. Hamilton, MT 59840	137.78
Six	01/15/86	514 Main St. Hamilton, MT 59480	7,229.90
Seven	02/13/86	709 North 7th St. Hamilton, MT 59840	696.75
Eight	02/13/86	601 & 602 1/2 N. 2nd St. Hamilton, MT 59840	537.73
Nine	02/02/86	849 Porter Hill Road Stevensville, MT 59870	158.83
Ten	03/11/86	208 Doran Lane Hamilton, MT 59840	7,708.81

Count	Date	Property	Settlement Sheet
Eleven	03/28/86	529 Folly Lane Stevensville, MT 59870	94.11
Twelve	03/24/86	523 Folly Lane Stevensville, MT 59870	122.61
Thirteen	03/24/86	535 Folly Lane Stevensville, MT 59870	31.07
Fourteen	03/28/86	545 Folly Lane Stevensville, MT 59870	383.46
Fifteen	05/14/86	295 First Street Corvallis, MT 59828	640.24
Sixteen	06/17/86	21 Meadow Lane Victor, MT 59875	846.39
Seventeen	07/22/86	175 N. Tudor Victor, MT 59875	524.40
Eighteen	08/29/86	675 Main Street Victor, MT 59875	1,820.10
Nineteen	12/09/86	NHN Pine Drive Victor, MT 59875	179.77
Twenty	07/31/86	705 21st St. North Great Falls, MT 59401	523.03
Twenty-One	07/31/86	144 Blake Street Victor, MT 59875	555.61
Twenty-Two	08/21/86	108 Second St. Alberton, MT 59820	191.54
Twenty-Three	08/19/86	908 Fourteenth Ave. S. Great Falls, MT 59405	740.84
Twenty-Four	08/13/86	210 16th St. North Great Falls, MT 59401	726.83
Twenty-Five	08/13/86	119 4th St. W. Cascade, MT 59421	659.54
Twenty-Six	10/17/86	709 35th Ave. N.E. Great Falls, MT 59401	416.39
Twenty-Seven	10/17/86	NHN 3rd Ave. S. and Main Street Belt, MT 59412	3,300.07

Count	Date	Property	Settlement Sheet
Twenty-Eight	11/06/86	126 4th St. W. Cascade, MT 59421	129.93
Twenty-Nine	11/12/86	921 3rd Ave. South Great Falls, MT 59401	400.76
Thirty	10/16/86	1320 11th Ave. S. Great Falls, MT 59401	375.36
Thirty-One	11/06/86	1524 4th Ave. N.W. Great Falls, MT 59401	91.83
Thirty-Two	12/01/86	301 12th St. North Great Falls, MT 59401	189.16
Thirty-Three	10/17/86	3209 3rd Ave. North Great Falls, MT 59401	369.13
Thirty-Four	11/13/86	1117 10th Ave. N. Great Falls, MT 59401	395.28
Thirty-Five	12/01/86	420 18th St. S. Great Falls, MT 59401	209.64
Thirty-Six	11/13/86	1308 2nd Ave. S. Great Falls, MT 59401	322.55
Thirty-Seven	12/02/86	415 Seventh St. Hamilton, MT 59840	171.31
Thirty-Eight	12/24/86	1020 2nd Ave. S.W. Great Falls, MT 59401	296.42
Thirty-Nine	01/28/87	518 1st Ave. S.W. Great Falls, MT 59404	321.44
Forty	01/05/87	1204 2nd Ave. South Great Falls, MT 59405	164.26
Forty-One	12/24/86	3221 6th Ave. North Great Falls, MT 59401	272.86
Forty-Two	12/30/86	721 8th Ave. South Great Falls, MT 59405	256.22

and by so representing Michael Earl Gaudin d/b/a Hallmark Properties, Montana Regency, Inc. and Northwest Housing, Inc. obtained approximately $1,013,046.00 in

federally insured funds to which he was not entitled in violation of Title 18 U.S.C. § 1001.

With respect to the offenses charged in Counts Two through Forty-Two of the Indictment, you are instructed that section 1001 of Title 18 of the United States Code provides:

[2392]

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes false, fictitious or fraudulent statement or entry . . . shall be guilty of an offense against the laws of the United States.

In order for the defendant, MICHAEL E. GAUDIN, to be found guilty of the offenses charged in Counts Two through Forty-Two of the Indictment, the Government must prove, as to each count, the following six essential elements beyond a reasonable doubt:

FIRST: That the defendant, MICHAEL E. GAUDIN, made, or caused to be made, a writing which contained a statement in a matter within the jurisdiction of the United States Department of Housing and Urban Development acting through the Federal Housing Administration;

SECOND: That the writing contained false, fictitious and fraudulent statements and entries;

THIRD: That the defendant, MICHAEL E. GAUDIN, knew or should have known that the statement was made in a matter within the jurisdiction of the United States Department of Housing and Urban Development acting through the Federal Housing Administration;

FOURTH: That the defendant, MICHAEL E. GAUDIN, knew that the writing contained false, fictitious and fraudulent statements and entries;

[2393] *FIFTH*: That the defendant, MICHAEL E. GAUDIN, acted with the intention of influencing the

United States Department of Housing and Urban Development acting through the Federal Housing Administration; and

SIXTH: That the statement was material to the activities or decisions of the United States Department of Housing and Urban Development acting through the Federal Housing Administration.

I remind you again that the burden is upon the Government to prove, beyond a reasonable doubt, each and every one of these essential elements I have set forth. The law never imposes upon the defendant in a criminal case the burden of introducing any evidence or calling any witnesses.

With respect to the first elements set forth above, I instruct you that, as a matter of law, the writing charged in the Indictment contains a statement in a matter within the jurisdiction of the United States Department of Housing and Urban Development acting through the Federal Housing Administration.

The second element of this charge holds the Government to proving, beyond a reasonable doubt, that the writing contained false, fictitious and fraudulent statements and entries. I instruct you that a statement is "false" or "fictitious", if untrue when made, and then [2394] known to be untrue by the person making it or causing it to be made. A statement or representation is "fraudulent", if known to be untrue, and made or caused to be made with the intent to deceive the government agency to whom submitted.

The word "false" must be considered together with the words "knowingly" and "willfully". An act is done "knowingly" if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason. An act is done "willfully" if done voluntarily and intentionally, and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law. The word "knowingly" is added in order to insure that no one would be con-

victed who made or caused to be made a statement or representation which was false because of mistake or accident or other innocent reason.

If you find that defendant, MICHAEL E. GAUDIN, did not knowingly and willfully make false statements or cause any to be made, you should acquit him.

With respect to the fifth element set forth above, you are instructed that whether or not the Government was deceived or suffered monetary loss because of the acts charged in the Indictment is immaterial.

With reference to the sixth element, I instruct you [2395] that the making of a false statement to an agency of the United States Government is not an offense unless the statement made is a material statement. The issue of materiality, however, is not submitted to you for your decision but rather is a matter for the decision of the court. You are instructed that the statements charged in the indictment are material statements.

You are instructed that in this case the Government is required to prove, beyond a reasonable doubt, that Michael Gaudin acted willfully; that is to say voluntarily, and with the specific intent to do something the law forbids.

However, if a person in good faith believes he has conformed to the law, he cannot be guilty of any willful or criminal intent as defined in these instructions. The reasonableness of his belief is for the jury to decide, and this belief is based upon whether he acted in good faith under the circumstances or whether he willfully intended to violate the law. This issue of intent is one which the jury must determine from a consideration of all the evidence in the case bearing upon the defendant's state of mind. Such a good faith belief, if honestly held, would entitle the defendant to an acquittal of the charges made against him.

You are reminded that the Government is required to [2396] prove all of the elements including an element of intent and the defendant need only raise a doubt to this issue to be entitled to an acquittal. In other words, the

burden of proof does not shift to the defendant on the issue of good faith but always remains with the Government to prove willfulness beyond a reasonable doubt.

The defendant claims that he is not guilty of willful wrongdoing because he acted on the basis of advice from his attorney.

If the defendant before taking any action sought the advice of an attorney whom he considered competent, in good faith and for the purpose of securing advice on the lawfulness of his possible future conduct, and made a full and accurate report to this attorney of all material facts of which he has the means of knowledge, and acted strictly in accordance with the advice of his attorney given following his full report, then the defendant would not be willfully doing wrong in doing something the law forbids, as that term is used in these instructions.

Whether the defendant acted in good faith for the purpose of seeking guidance as to questions about which he was in doubt, and whether he made a full and complete report to this attorney, and whether he acted strictly in accordance with the advice received, are questions for [2397] you to determine.

Count Forty-Three of the Indictment in this case charges:

That on or about the 2nd day of September, 1986 within the State and District of Montana, Russell Carl Bottleson and Michael Earl Gaudin in a matter within the jurisdiction of the United States Department of Housing and Urban Development acting through the Federal Housing Administration did knowingly and willfully make or cause to be made false, fictitious and fraudulent statement to be made on a residential appraisal report HUD Form 92800 in that Russell Carl Bottelson signed line 34A of said form certifying that he had carefully viewed the property described in the report when in truth and in fact as they then well knew the property described in the report had been viewed by Robert Forrest Payne, Jr., all in violation of Title 18 U.S.C. § 1001.

Count Forty-Four of the Indictment in this case charges:

That on or about the 16th day of November, 1986 in the State and District of Montana the defendants Robert Forrest Payne, Jr., and Michael E. Gaudin in a matter within the jurisdiction of the United States Department of Housing and Urban Development acting through the Federal Housing Administration did knowingly and willfully cause false, fictitious and fraudulent [2398] statements to be made on a residential appraisal report HUD Form 92800 in that Payne grossly overstated the fair market value of the subject property and further falsely represented the condition of the interior walls, floors and plumbing to be "good" when in truth and in fact as Payne and Gaudin then well knew the subject property had a fair market value of approximately $20,000 less than appraised by Payne and the walls, floors and plumbing were in very poor condition all in violation of Title 18 U.S.C. § 1001.

Count Forty-Five of the Indictment in this case charges:

That on or about the 19th day of November, 1986 in the State and District of Montana the defendants Robert Forrest Payne, Jr. and Michael E. Gaudin in a matter within the jurdisdiction of the United States Department of Housing and Urban Development acting through the Federal Housing Administration did knowingly and willfully cause a false, fictitious and fraudulent statement to be made on a residential appraisal report HUD Form 92800 in that Payne grossly overstated the fair market value of the subject property to be $46,000 when in truth and in fact that Payne and Gaudin then well knew the fair market value of the property was $20,000 less than listed on the residential appraisal report all in [2399] violation of Title 18 U.S.C. § 1001.

Count Forty-Six of the Indictment in this case charges:

That sometime prior to February 14, 1987 in the State and District of Montana the defendants Robert Forrest Payne, Jr. and Michael E. Gaudin in a matter within the jurisdiction of the United States Department of Housing and Urban Development acting through the Federal Housing Administration did knowingly and willfully cause a false, fictitious and fraudulent statement to be made on a residential appraisal report HUD Form 92800 in that Payne listed the fair market value of the subject property to be $48,500 when in truth and in fact as Payne and Gaudin then well knew the actual fair market value of the subject property was approximately $12,000 all in violation of Title 18 U.S.C. § 1001.

In order for the defendant, MICHAEL E. GAUDIN, to be found guilty of the offenses charged in Counts Forty-Three, Forty-Four, Forty-Five and Forty-Six of the Indictment, the Government must prove, as to each count, the following six essential elements beyond a reasonable doubt:

FIRST: That the defendant, MICHAEL E. GAUDIN, caused a statement to be made in a matter within the [2400] jurisdiction of the United States Department of Housing and Urban Development acting through the Federal Housing Administration;

SECOND: That the statement was false, fictitious and fraudulent;

THIRD: That the defendant, MICHAEL E. GAUDIN, knew or should have known that the statement was made in a matter within the jurisdiction of the United States Department of Housing and Urban Development acting through the Federal Housing Administration;

FOURTH: That the defendant, MICHAEL E. GAUDIN, knew that the statement was false, fictitious and fraudulent;

FIFTH: That the defendant, MICHAEL E. GAUDIN, acted with the intention of influencing the United States

Department of Housing and Urban Development acting through the Federal Housing Administration; and

SIXTH: That the statement was material to the activities or decisions of the United States Department of Housing and Urban Development acting through the Federal Housing Administration.

With respect to the first element set forth above, I instruct you that, as a matter of law, the writings charged in the Indictment contain statements in a matter within the jurisdiction of the United States Department of Housing and Urban Development acting through the [2401] Federal Housing Administration.

The second element of this charge holds the Government to proving, beyond a reasonable doubt, that the writings contained false, fictitious and fraudulent statements and entries. I instruct you that a statement is "false" or "fictitious", if untrue when made, and then known to be untrue by the person making it or causing it to be made. A statement or representation is "fraudulent", if known to be untrue, and made or caused to be made with the intent to deceive the government agency to whom submitted.

The word "false" must be considered together with the words "knowingly" and "willfully". An act is done "knowingly" if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason. An act is done "willfully" if done voluntarily and intentionally, and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law. The word "knowingly" is added in order to insure that no one would be convicted who made or caused to be made a statement or representation which was false because of mistake or accident or other innocent reason.

If you find that defendant, MICHAEL E. GAUDIN, did not knowingly and willfully make false statements or [2402] cause any to be made, you should acquit him.

With respect to the fifth element set forth above, you are instructed that whether or not the Government was

deceived or suffered monetary loss because of the acts charged in the Indictment is immaterial.

With reference to the sixth element, I instruct you that the making of a false statement to an agency of the United States Government is not an offense unless the statement made is a material statement. The issue of materiality, however, is not submitted to you for your decision but rather is a matter for the decision of the court. You are instructed that the statements charged in the indictment are material statements.

You are instructed that in this case the Government is required to prove, beyond a reasonable doubt, that Michael Gaudin acted willfully; that is to say voluntarily, and with the specific intent to do something the law forbids.

However, if a person in good faith believes he has conformed to the law, he cannot be guilty of any willful or criminal intent as defined in these instructions. The reasonableness of his belief is for the jury to decide, and this belief is based upon whether he acted in good faith under the circumstances or whether he willfully intended to violate the law. This issue of intent is one [2403] which the jury must determine from a consideration of all the evidence in the case bearing upon the defendant's state of mind. Such a good faith belief, if honestly held, would entitle the defendant to an acquittal of the charges made against him.

You are reminded that the Government is required to prove all of the elements including an element of intent and the defendant need only raise a doubt to this issue to be entitled to an acquittal. In other words, the burden of proof does not shift to the defendant on the issue of good faith but always remains with the Government to prove willfulness beyond a reasonable doubt.

The defendant claims that he is not guilty of willful wrongdoing because he acted on the basis of advice from his attorney.

If the defendant before taking any action sought the advice of an attorney whom he considered competent, in

good faith and for the purpose of securing advice on the lawfulness of his possible future conduct, and made a full and accurate report to his attorney of all material facts of which he has the means of knowledge, and acted strictly in accordance with the advice of his attorney given following his full report, then the defendant would not be willfully doing wrong in doing something the law [2404] forbids, as that term is used in these instructions.

Whether the defendant acted in good faith for the purpose of seeking guidance as to questions about which he was in doubt, and whether he made a full and complete report to this attorney, and whether he acted strictly in accordance with the advice received, are questions for you to determine.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

Docket No. CR-89-34-M-PGH

UNITED STATES OF AMERICA, PLAINTIFF

v.

MICHAEL E. GAUDIN, DEFENDANT

[Filed Sept. 4, 1990]

JUDGMENT AND COMMITMENT

On the 27th day of August, 1990, came Kris A. McLean, Assistant United States Attorney for the District of Montana, and the defendant, MICHAEL E. GAUDIN, appearing in his proper person and represented by his counsel, Stephen C. Moses, Attorney at Law, P.O. Box 2533, Billings, Montana 59103 (406) 248-7702.

And the defendant having been convicted on his plea of not guilty and a verdict of guilty by a jury of the offenses charged in Counts One through Seventeen, Counts Nineteen through Forty-Two and Counts Forty-Four, Forty-Five and Forty-Six of the Indictment filed in the above-entitled cause, to-wit:

COUNT ONE

From on or about December 31, 1985 and continuing through on or about December 31, 1988 within the District of Montana, Michael Earl Gaudin doing business as Hallmark Properties, Montana Regency, Inc. and Northwest Housing, Inc. with intent to defraud knowing and willfully engaged in the following pattern and practice:

A. Michael Earl Gaudin d/b/a Hallmark Properties, Montana Regency, Inc. and Northwest Housing, Inc. pur-

chased approximately 29 single family dwellings the loans on which were secured by deeds of trust and mortgages and insured by the United States Secretary of Housing and Urban Development. Within one year of said real estate purchases the loans were in default.

B. That Michael Earl Gaudin d/b/a Hallmark Properties, Montana Regency, Inc. and Northwest Housing, Inc. knowingly failed to make payments under the mortgage or deed of trust of said residential dwellings as the payments came due.

C. That Michael Earl Gaudin d/b/a Hallmark Properties, Montana Regency, Inc. and Northwest Housing, Inc. rented the properties to various tenants and applied and authorized the application of rents from said dwellings in the approximate amount of $120,000 for his own use. All in violation of Title 12 U.S.C. § 1709-2.

COUNTS TWO THROUGH FORTY-TWO

That on or about the date for each count listed below within the District of Montana, defendant Michael E. Gaudin d/b/a Hallmark Properties, Montana Regency, Inc. and Northwest Housing, Inc. in a matter within the jurisdiction of the United States Department of Housing and Urban Development acting through the Federal Housing Administration did knowingly and willfully make or caused to be made a false writing and document knowing said writing and document contained false, fictitious and fraudulent statements and entries in that the defendant Michael Earl Gaudin d/b/a Hallmark Properties, Montana Regency, Inc. and Northwest Housing, Inc. submitted and caused to be submitted to the United States in connection with the loan closing settlement of each of the District of Montana properties listed in the column entitled "Property" a "Settlement Statement" on which Michael Earl Gaudin d/b/a Hallmark Properties, Montana Regency, Inc. and Northwest Housing, Inc. represented that the borrower had made a cash payment at settlement of the dollar amount listed in the column entitled "Settle-

ment Sheet" whereas in truth and in fact as defendant Michael E. Gaudin d/b/a Hallmark Properties, Montana Regency, Inc. and Northwest Housing, Inc. well knew the borrowers had made no actual cash payment and had in fact received a $1,000 payment from Michael Earl Gaudin for acting as a straw buyer:

Count	Date	Property	Settlement Sheet
Two	12/31/85	212 Higgins, Ave. Stevensville, MT 59870	$7,022.64
Three	03/20/86	450 Sixth Ave. Victor, MT 59875	6,860.19
Four	02/10/86	655 Sixth Ave. Victor, MT 59875	237.68
Five	02/10/86	309 DeSmet St. Hamilton, MT 59840	137.78
Six	01/15/86	514 Main St. Hamilton, MT 59480	7,229.90
Seven	02/13/86	709 North 7th St. Hamilton, MT 59840	696.75
Eight	02/13/86	601 & 602 1/2 N. 2nd St. Hamilton, MT 59840	537.73
Nine	02/02/86	849 Porter Hill Road Stevensville, MT 59870	158.83
Ten	03/11/86	208 Doran Lane Hamilton, MT 59840	7,708.81
Eleven	03/28/86	529 Folly Lane Stevensville, MT 59870	94.11
Twelve	03/24/86	523 Folly Lane Stevensville, MT 59870	122.61
Thirteen	03/24/86	535 Folly Lane Stevensville, MT 59870	31.07
Fourteen	03/28/86	545 Folly Lane Stevensville, MT 59870	383.46
Fifteen	05/14/86	295 First Street Corvallis, MT 59828	640.24

Count	Date	Property	Settlement Sheet
Sixteen	06/17/86	21 Meadow Lane Victor, MT 59875	846.39
Seventeen	07/22/86	175 N. Tudor Victor, MT 59875	524.40
Eighteen	08/29/86	675 Main Street Victor, MT 59875	1,820.10
Nineteen	12/09/86	NHN Pine Drive Victor, MT 59875	179.77
Twenty	07/31/86	705 21st St. North Great Falls, MT 59401	523.03
Twenty-One	07/31/86	144 Blake Street Victor, MT 59875	555.61
Twenty-Two	08/21/86	108 Second St. Alberton, MT 59820	191.54
Twenty-Three	08/19/86	908 Fourteenth Ave. S. Great Falls, MT 59405	740.84
Twenty-Four	08/13/86	210 16th St. North Great Falls, MT 59401	726.83
Twenty-Five	08/13/86	119 4th St. W. Cascade, MT 59421	659.54
Twenty-Six	10/17/86	709 35th Ave. N.E. Great Falls, MT 59401	416.39
Twenty-Seven	10/17/86	NHN 3rd Ave. S. and Main Street Belt, MT 59412	3,300.07
Twenty-Eight	11/06/86	126 4th St. W. Cascade, MT 59421	129.93
Twenty-Nine	11/12/86	921 3rd Ave. South Great Falls, MT 59401	400.76
Thirty	10/16/86	1320 11th Ave. S. Great Falls, MT 59401	375.36
Thirty-One	11/06/86	1524 4th Ave. N.W. Great Falls, MT 59401	91.83

Count	Date	Property	Settlement Sheet
Thirty-Two	12/01/86	301 12th St. North Great Falls, MT 59401	189.16
Thirty-Three	10/17/86	3209 3rd Ave. North Great Falls, MT 59401	369.13
Thirty-Four	11/13/86	1117 10th Ave. N. Great Falls, MT 59401	395.28
Thirty-Five	12/01/86	420 18th St. S. Great Falls, MT 59401	209.64
Thirty-Six	11/13/86	1308 2nd Ave. S. Great Falls, MT 59401	322.55
Thirty-Seven	12/02/86	415 Seventh St. Hamilton, MT 59840	171.31
Thirty-Eight	12/24/86	1020 2nd Ave. S.W. Great Falls, MT 59401	296.42
Thirty-Nine	01/28/87	518 1st Ave. S.W. Great Falls, MT 59404	321.44
Forty	01/05/87	1204 2nd Ave. South Great Falls, MT 59405	164.26
Forty-One	12/24/86	3221 6th Ave. North Great Falls, MT 59401	272.86
Forty-Two	12/30/86	721 8th Ave. South Great Falls, MT 59405	256.22

and by so representing Michael Earl Gaudin d/b/a Hallmark Properties, Montana Regency, Inc. and Northwest Housing, Inc. obtained approximately $1,013,046.00 in federally insured funds to which he was not entitled in violation of Title 18 U.S.C. § 1001.

COUNT FORTY-FOUR

That on or about the 16th day of November, 1986 in the State and District of Montana the defendants Robert Forrest Payne, Jr. and Michael E. Gaudin in a matter within the jurisdiction of the United States Department of Housing and Urban Development acting through the

Federal Housing Administration did knowingly and willfully cause false, fictitious and fraudulent statements to be made on a residential appraisal report HUD Form 92800 in that Payne grossly overstated the fair market value of the subject property and further falsely represented the condition of the interior walls, floors and plumbing to be "good" when in truth and in fact as Payne and Gaudin then well knew the subject property had a fair market value of approximately $20,000 less than appraised by Payne and the walls, floors and plumbing were in very poor condition all in violation of Title 18 U.S.C. § 1001.

COUNT FORTY-FIVE

That on or about the 19th day of November, 1986 in the State and District of Montana the defendants Robert Forrest Payne, Jr. and Michael E. Gaudin in a matter within the jurisdiction of the United States Department of Housing and Urban Development acting through the Federal Housing Administration did knowingly and willfully cause a false, fictitious and fraudulent statement to be made on a residential appraisal report HUD Form 92800 in that Payne grossly overstated the fair market value of the subject property to be $46,000 when in truth and in fact that Payne and Gaudin then well knew the fair market value of the property was $20,000 less than listed on the residential appraisal report all in violation of Title 18 U.S.C. § 1001.

COUNT FORTY-SIX

That sometime prior to February 14, 1987 in the State and District of Montana the defendants Robert Forrest Payne, Jr. and Michael E. Gaudin in a matter within the jurisdiction of the United States Department of Housing and Urban Development acting through the Federal Housing Administration did knowingly and willfully cause a false, fictitious and fraudulent statement to be made on a residential appraisal report HUD Form

92800 in that Payne listed the fair market value of the subject property to be $48,500 when in truth and in fact as Payne and Gaudin then well knew the actual fair market value of the subject property was approximately $12,000 all in violation of Title 18 U.S.C. § 1001.

And the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary appearing or being shown to the court,

IT IS THE JUDGMENT OF THE COURT that the defendant, MICHAEL E. GAUDIN, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of THIRTY-SIX MONTHS. This term consists of the term of Thirty-Six Months on Count I, and terms of Ten Months on each of Counts 2 through 17, 19 through 42, and 44, 45 and 46, all to be served concurrently.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of THREE (3) YEARS each on Counts I through 17, 19 through 42, and 44, 45 and 46; all such terms to run concurrently. Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in the district to which the defendant is released.

While on supervised release, the defendant shall not commit another federal, state, or local crime, shall comply with the standard conditions that have been adopted by this court, and shall comply with the following additional conditions:

1. That he cooperate to accomplish the sale of any real estate remaining.

2. That he make restitution in the amounts and to the various persons as determined by counsel and the United States Probation Officer; and

3. That he pay a fine to the United States in the amount of TWO THOUSAND TWO HUNDRED AND NO/100 DOLLARS ($2,200.00), to be deposited into

a special Crime Victims Fund, pursuant to 18 U.S.C. § 3013.

DATED this 4[th] day of September 1990.

/s/ Paul G. Hatfield

PAUL G. HATFIELD
Chief Judge
United States District Court

SUPREME COURT OF THE UNITED STATES

No. 94-514

UNITED STATES, PETITIONER

v.

MICHAEL GAUDIN

ORDER ALLOWING CERTIORARI

Filed January 6, 1995

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted limited to Question 1 presented by the petition.

January 6, 1995

☆ U. S. GOVERNMENT PRINTING OFFICE: 1995 387147 20040

(6)

No. 94-514

Supreme Court, U.S.
FILED
FEB 21 1995
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL E. GAUDIN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

RICHARD H. SEAMON
Assistant to the Solicitor General

KATHLEEN A. FELTON
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether, in a prosecution under 18 U.S.C. 1001 for making false statements in a matter within the jurisdiction of a federal agency, the materiality of those statements is an issue to be decided by the court rather than the jury.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provision involved	2
Statement	2
Summary of argument	8
Argument:	
The materiality of a false statement under 18 U.S.C. 1001 is determined by the court rather than the jury	11
I. Materiality is determined by the court as a matter of precedent and history	12
A. *Sinclair* and *Kungys* establish that materiality is determined by the court	12
B. The practice of having the court determine materiality has deep historical roots	16
C. Section 1001, like its historical antecedents, assigns the question of materiality to the court	22
II. The determination of materiality by the court is constitutional	25
A. The historical allocation of materiality to the court attests to its constitutionality	26
B. The principles of *In re Winship* do not require departure from longstanding practice	31
C. The determination of materiality by the court is not fundamentally unfair	40
Conclusion	45

TABLE OF AUTHORITIES

Cases:

Agnew v. *United States*, 165 U.S. 36 (1897)	35
Apodaca v. *Oregon*, 406 U.S. 404 (1972)	28

Cases—Continued: Page

Barnes v. *State*, 15 Ohio C.C. 14 (1898) 19
Braden v. *United States*, 365 U.S. 431 (1961) 14
Bronston v. *United States*, 409 U.S. 352 (1973) 25
Cabana v. *Bullock*, 474 U.S. 376 (1986) 6
Carella v. *California*, 491 U.S. 263 (1989) 38
Carroll v. *United States*, 16 F.2d 951 (2d Cir.), cert. denied, 273 U.S. 763 (1927) 13, 20, 25
Chaunt v. *United States*, 364 U.S. 350 (1960) 38
Commonwealth v. *Lafferty*, 419 A.2d 518 (Pa. Super. Ct. 1980) 29
Commonwealth v. *McDuffee*, 398 N.E.2d 463 (Mass. 1979) 30
Connecticut v. *Johnson*, 460 U.S. 73 (1983) 38
Cool v. *United States*, 409 U.S. 100 (1972) 39
Cothran v. *State*, 39 Miss. 541 (1860) 13, 18
County Court v. *Allen*, 442 U.S. 140 (1979) 33, 39
Crane v. *Kentucky*, 476 U.S. 683 (1986) 43
Davis v. *United States*, 160 U.S. 469 (1895) 34, 36
Deutch v. *United States*, 367 U.S. 456 (1961) 14
Dowling v. *United States*, 493 U.S. 342 (1990) 27, 40
Egan v. *United States*, 52 App. D.C. 384 (1923) 35
Estelle v. *McGuire*, 112 S. Ct. 475 (1991) 33
Fedorenko v. *United States*, 449 U.S. 490 (1981) 14
Francis v. *Franklin*, 471 U.S. 307 (1985) 38
Freidus v. *United States*, 223 F.2d 598 (D.C. Cir. 1955) 11, 25
Gordon v. *State*, 48 N.J.L. (19 Vroom) 611 (1886) 19
Gullett v. *State*, 523 So. 2d 296 (Miss. 1988) 29
Holland v. *Illinois*, 493 U.S. 474 (1990) 28
Holt v. *United States*, 218 U.S. 245 (1910) 36
Honda Motor Co. v. *Oberg*, 114 S. Ct. 2331 (1994) 26
Jackson v. *Denno*, 378 U.S. 368 (1964) 43
Jackson v. *Virginia*, 443 U.S. 307 (1979) 38
Johnson v. *Louisiana*, 406 U.S. 356 (1972) 28, 34
Kungys v. *United States*, 485 U.S. 759 (1988) .....*passim*
Lawrence v. *State*, 2 Tex. Crim. 479 (1877) 18
Leary v. *United States*, 395 U.S. 6 (1969) 40
Martin v. *Ohio*, 480 U.S. 228 (1987) 27

Cases—Continued: Page

Masinia v. *United States*, 296 F.2d 871 (8th Cir. 1961) 30
McMillan v. *Pennsylvania*, 477 U.S. 79 (1986) 39
Medina v. *California*, 112 S. Ct. 2572 (1992) 27, 29, 40
Miles v. *United States*, 103 U.S. 304 (1881) 36
Molzof v. *United States*, 112 S. Ct. 711 (1992) 25
Morissette v. *United States*, 342 U.S. 246 (1952) .. 24, 38
Mullaney v. *Wilbur*, 421 U.S. 684 (1975) 39
Murray's Lessee v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856) 26
NLRB v. *Amax Coal Co.*, 453 U.S. 322 (1981) 25
Nelson v. *State*, 32 Ark. 192 (1877) 18
New York Trust Co. v. *Eisner*, 256 U.S. 345 (1921) 41
Pacific Mutual Life Ins. Co. v. *Haslip*, 499 U.S. 1 (1991) 27
Paritem Singh Poonian v. *United States*, 294 F.2d 74 (9th Cir. 1961) 11
Patterson v. *New York*, 432 U.S. 197 (1977) 27, 29, 33, 36, 39
People v. *Hedgecock*, 795 P.2d 1260 (Cal. 1990) 30
People v. *Hoag*, 318 N.W.2d 579 (Mich. Ct. App. 1982) 29
People v. *Jones*, 1 Mich. N.P. (1 Brown) 141 (Cir. Ct. 1869) 18
People v. *Lem You*, 97 Cal. 224 (1893) 19
People v. *Powell*, 513 N.E.2d 1162 (App. Ct. 1987), appeal denied, 520 N.E.2d 391 (Ill.), cert. denied, 486 U.S. 1025 (1988) 29
People v. *Smith*, 597 P.2d 204 (Colo. 1979) 29
Peters v. *United States*, 2 Okla. 138 (1894) 19
Power v. *Price*, 16 Wend. 450 (N.Y. 1836) 18
Regina v. *Gibbon*, Le. & Ca. 109, 169 Eng. Rep. 1324 (1861) 17
Regina v. *Lavey*, 3 Car. & K. 26, 175 Eng. Rep. 448 (Q.B. 1850) 17
Regina v. *Southwood*, 1 F. & F. 356, 175 Eng. Rep. 762 (1858) 17
Renan v. *Commonwealth*, 2 Ky. L. Rptr. 66 (1880) 18-19
Russell v. *United States*, 369 U.S. 749 (1962) 14, 36

Cases—Continued: Page

Sandstrom v. *Montana*, 442 U.S. 510 (1979) 33, 38
Santosky v. *Kramer*, 455 U.S. 745 (1982) 33
Schad v. *Arizona*, 501 U.S. 624 (1991) 26, 27
Schneiderman v. *United States*, 320 U.S. 118 (1943) 38
Sinclair v. *United States*, 279 U.S. 263 (1929) ..... *passim*
Sparf & Hansen v. *United States*, 156 U.S. 51 (1895) 33, 34, 35
State v. *Albin*, 720 P.2d 1256 (Ct. App.), cert. denied, 719 P.2d 1267 (N.M. 1986) 29
State v. *Anderson*, 603 A.2d 928 (N.J. 1992) 30
State v. *Brown*, 111 La. 170 (1903) 19
State v. *Caywood*, 96 Iowa 367 (1895) 19
State v. *Daniels*, 520 P.2d 178 (Wash. Ct. App.), review denied, 84 Wash. 2d 1002 (1974) 29
State v. *Deets*, 195 N.W.2d 118 (Iowa 1972) 29
State v. *Edgington*, 573 P.2d 1059 (Kan. 1978) 29
State v. *French*, 509 N.W.2d 698 (S.D. 1993) 29
State v. *Hanson*, 302 N.W.2d 399 (N.D. 1981) 29
State v. *Hare*, 95 N.C. 682 (1886) 19
State v. *Lewis*, 10 Kan. 157 (1872) 18
State v. *Lunney*, 400 A.2d 759 (Me. 1979) 29
State v. *Occhipinti*, 358 So. 2d 1209 (La. 1978) 19
State v. *Roberson*, 543 S.W.2d 817 (Mo. Ct. App. 1976) 29
State v. *Rosenbaum*, No. 974-93, 1994 WL 665576 (Tex. Crim. App. 1994) 29
State v. *Spencer*, 45 La. Ann. 1 (1892) 19
State v. *Strand*, 720 P.2d 425 (Utah 1986) 29
State v. *Thompson*, 576 P.2d 1105 (Mont. 1978) 29
State v. *West*, 419 So. 2d 868 (La. 1982) 29
State v. *Williams*, 30 Mo. 364 (1860) 18
Steinman v. *McWilliams*, 6 Pa. (6 Barr) 170 (1847) 18
Sullivan v. *Louisiana*, 113 S. Ct. 2078 (1993) 6, 33, 34, 37
The Queen v. *Courtney*, 5 Ir. R.-C.L. 434 (Ct. Cr. App. 1856) 17
Thompson v. *People*, 26 Colo. 496 (1899) 19
Tot v. *United States*, 319 U.S. 463 (1943) 40
Turner v. *United States*, 396 U.S. 398 (1970) 40

Cases—Continued: Page

United States v. *Abadi*, 706 F.2d 178 (6th Cir.), cert. denied, 464 U.S. 821 (1983) 15, 22, 37
United States v. *Abroms*, 947 F.2d 1241 (5th Cir. 1991), cert. denied, 112 S. Ct. 2992 (1992) 37
United States v. *Alu*, 246 F.2d 29 (2d Cir. 1957) 30
United States v. *Arch Trading Co.*, 987 F.2d 1087 (4th Cir. 1993) 22
United States v. *Bedgood*, 49 F. 54 (S.D. Ala. 1891) 19
United States v. *Bramblett*, 348 U.S. 503 (1955) 23, 24
United States v. *Clark*, 918 F.2d 843 (9th Cir. 1990) 30
United States v. *Corsino*, 812 F.2d 26 (1st Cir. 1987) 11, 22
United States v. *Cowing*, 25 F. Cas. 680 (C.C.D.C. 1835) (No. 14,880) 19-20
United States v. *Daily*, 921 F.2d 994 (10th Cir. 1990), cert. denied, 112 S. Ct. 405 (1991) 22, 37
United States v. *Elkin*, 731 F.2d 1005 (2d Cir.), cert. denied, 469 U.S. 822 (1984) 12
United States v. *Flake*, 746 F.2d 535 (9th Cir. 1984), cert. denied, 469 U.S. 1225 (1985) 31
United States v. *Forrest*, 623 F.2d 1107 (5th Cir.), cert. denied, 449 U.S. 924 (1980) 30
United States v. *Gaines*, 690 F.2d 849 (11th Cir. 1982) 31
United States v. *Giacolone*, 587 F.2d 5 (6th Cir. 1978), cert. denied, 442 U.S. 940 (1979) 30
United States v. *Gilliland*, 312 U.S. 86 (1941) 24
United States v. *Greber*, 760 F.2d 68 (3d Cir.), cert. denied, 474 U.S. 988 (1985) 22
United States v. *Greenberg*, 735 F.2d 29 (2d Cir. 1984) 31
United States v. *Gribben*, 984 F.2d 47 (2d Cir. 1993) 22, 37
United States v. *Hall*, 44 F. 864 (S.D. Ga. 1890) 20
United States v. *Hansen*, 772 F.2d 940 (D.C. Cir. 1985), cert. denied, 475 U.S. 1045 (1986) 23, 43, 44
United States v. *Hausmann*, 711 F.2d 615 (5th Cir. 1983) 22

Cases—Continued: Page

United States v. *Haynes*, 573 F.2d 236 (5th Cir.), cert. denied, 439 U.S. 850 (1978) 31
United States v. *Johnson*, 937 F.2d 392 (8th Cir. 1991) 22
United States v. *Landsberg*, 23 F. 585 (C.C.S.D. N.Y. 1882) 19
United States v. *Lichenstein*, 610 F.2d 1272 (5th Cir.), cert. denied, 447 U.S. 907 (1980) 11
United States v. *Lopez*, 728 F.2d 1359 (11th Cir.), cert. denied, 469 U.S. 828 (1984) 22-23
United States v. *Martel*, 792 F.2d 630 (7th Cir. 1986) 22
United States v. *Masters*, 484 F.2d 1251 (10th Cir. 1973) 30-31
United States v. *Null*, 415 F.2d 1178 (4th Cir. 1969) 31
United States v. *Paxson*, 861 F.2d 730 (D.C. Cir. 1988) 37
United States v. *Rivera*, 448 F.2d 757 (7th Cir. 1971) 30
United States v. *Rodgers*, 466 U.S. 475 (1984) 24, 25
United States v. *Romanow*, 509 F.2d 26 (1st Cir. 1975) 31
United States v. *Shinn*, 14 F. 447 (C.C.D. Or. 1882) 20
United States v. *Silver*, 235 F.2d 375 (2d Cir.), cert. denied, 352 U.S. 880 (1956) 12
United States v. *Singleton*, 54 F. 488 (S.D. Ala. 1892) 13, 19
United States v. *Staniforth*, 971 F.2d 1355 (7th Cir. 1992) 44
United States v. *Strand*, 617 F.2d 571 (10th Cir.), cert. denied, 449 U.S. 841 (1980) 31
United States v. *Taylor*, 574 F.2d 232 (5th Cir.), cert. denied, 439 U.S. 893 (1978) 31
United States v. *Watson*, 623 F.2d 1198 (7th Cir. 1980) 37
United States v. *Whyte*, 699 F.2d 375 (7th Cir. 1983) 31
United States v. *Valdez*, 594 F.2d 725 (9th Cir. 1979) 5

Cases—Continued: Page

United States v. *Yermian*, 468 U.S. 63 (1984) 23, 24
Victor v. *Nebraska*, 114 S. Ct. 1239 (1994)
Weinstock v. *United States*, 231 F.2d 699 (D.C. Cir. 1956) 25, 41
Williams v. *Florida*, 399 U.S. 78 (1970) 28
Williams v. *State*, 535 S.W.2d 842 (Ark. 1976) 29
Wilson v. *United States*, 232 U.S. 563 (1914) 36
Winship, In re, 397 U.S. 358 (1970) 6, 10, 26, 31, 32, 33, 36
Wolfe v. *State*, 271 So. 2d 132 (Fla. 1972) 29
Young v. *People*, 134 Ill. 37 (1890) 19

Constitution, statutes and rules:

U.S. Const.:
Amend. V 25, 26, 28
Due Process Clause 25, 26, 39
Amend. VI 25, 28, 29, 30, 34
Amend. VII 34
Act of Oct. 23, 1918, ch. 194, 40 Stat. 1015 23
§ 1, 40 Stat. 1015-1016 23
Act of June 18, 1934, ch. 587, 48 Stat. 996 24
Rev. Stat. § 102 (2 U.S.C. 192) 12, 13, 35
8 U.S.C. 1451(a) 11, 14, 15, 24, 38
12 U.S.C. 1709-2 2
18 U.S.C. 1001 ..... *passim*
18 U.S.C. 1621 30
18 U.S.C. 1623 30
26 U.S.C. 7206(1) 31
Fed. R. Crim. P. 12(b)(3) 43
Fed. R. Evid. 104 43

Miscellaneous:

American Law Institute, *Model Penal Code (Tentative Draft No. 6)* (1957) 30
2 American Law Institute, *Model Penal Code & Commentaries* (1980) 30
2 J. Bishop, *Commentaries on the Criminal Law:*
(1858) 16
(7th ed. 1882) 20-21
2 J. Bishop, *Commentaries on the Law of Criminal Procedure* (1866) 20

Miscellaneous—Continued: Page

4 W. Blackstone, *Commentaries* 14
48 C.J. *Perjury* (1929) 16
3 E. Coke, *Institutes* (6th ed. 1680) 14
1 T. Cooley, *A Treatise on Constitutional Limitations* (W. Carrington ed., 8th ed. 1927) 34
4 B. Elliott & W. Elliott, *A Treatise on the Law of Evidence* (1905) 21-22
3 S. Greenleaf, *A Treatise on the Law of Evidence*:
(2d ed. 1853) 20
(14th ed. 1883) 21
(16th ed. 1899) 21
1 W. LaFave & J. Israel, *Criminal Procedure* (1984) 43
J. May, *The Law of Crimes* (1881) 22
2 E. McClain, *A Treatise on the Criminal Law* (1897) 22
Perjury Act 1911, § 1(6), 12 *Halsbury's Statutes of England and Wales* (4th ed. 1994 reissue) 18
W. Prosser, *Handbook on the Law of Torts* (4th ed. 1971) 40
3 W. Russell, *A Treatise on Crimes and Misdemeanors* (5th ed. 1877) 17
K.C. Sears & H. Weihofen, *May's Law of Crimes* (4th ed. 1938) 22
2 Z. Swift, *A Digest of the Laws of the State of Connecticut* (1823) 16
J. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (reprint 1969) (1898) 34, 40
R. Underwood, *False Witness: A Lawyer's History of the Law of Perjury*, 10 Ariz. J. Int'l & Comp. L. 215 (1993) 16
2 F. Wharton, *A Treatise on Criminal Law* (J. Kerr ed., 11th ed. 1912) 21
F. Wharton, *A Treatise on the Criminal Law of the United States* (2d ed. 1852) 16, 20
F. Wharton, *A Treatise on the Law of Evidence in Criminal Issues* (O.N. Hilton ed., 10th ed. 1912) 21
9 J. Wigmore, *Evidence* (J. Chadbourn rev. ed. 1981) 34

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-514

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL E. GAUDIN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-50a) is reported at 28 F.3d 943. The panel opinion of the court of appeals (Pet. App. 51a-62a) is reported at 997 F.2d 1267.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1994. The petition for a writ of certiorari was filed on September 19, 1994, and was

granted on January 6, 1995 (J.A. 39). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 1001 of Title 18 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

After a jury trial in the United States District Court for the District of Montana, respondent was convicted on one count of equity skimming, in violation of 12 U.S.C. 1709-2, and 43 counts of making false statements, in violation of 18 U.S.C. 1001.[1] He was sentenced to 36 months' imprisonment on the equity skimming count and to concurrent ten-month terms of imprisonment on each of the 43 false statement counts, to be followed by three years' supervised release. He was also fined $2,200. A panel of the United States Court of Appeals for the Ninth Circuit affirmed the equity skimming conviction, but reversed the false statement convictions. Pet. App.

[1] Of the 45 counts charging false statements under 18 U.S.C. 1001, one count was dismissed before the case went to the jury, and another was dismissed at sentencing.

51a-62a. The Ninth Circuit granted the government's suggestion of rehearing en banc, and the en banc court, like the panel, affirmed respondent's equity skimming conviction but reversed his false statement convictions. *Id.* at 1a-50a.

1. Respondent was a real estate broker and developer who purchased rental housing, renovated it, and purported to sell it to buyers who took out loans insured by the Federal Housing Administration (FHA), an entity within the Department of Housing and Urban Development (HUD). The sales were fraudulent in two ways. First, respondent obtained inflated appraisals of the housing in order to increase the loans supplied by the lending institutions. Second, the buyers had no intention of actually owning the properties; they were "strawbuyers"—friends and relatives of respondent recruited to pose as real buyers. Respondent agreed to repurchase the properties from the strawbuyers at a $1,000 profit to them. In addition, he routinely refunded the down payments they made. Pet. App. 3a. After reacquiring the properties, respondent defaulted on 29 federally insured loans. Respondent made a profit of $982,003 from his scheme. *Id.* at 54a.

Counts 44 through 46 of the indictment charged that respondent violated 18 U.S.C. 1001 by causing false statements to be made on HUD/FHA form 92800-5. On that form, one of respondent's co-defendants certified the appraised value of the property securing the loan. The government's theory was that the statements were false because the appraisals were inflated.

Counts 2 through 17 and 19 through 42 charged that respondent violated Section 1001 by making false

statements on HUD/FHA form HUD-1. The HUD-1 form was the settlement statement used in closing the sales of the rental properties by respondent to strawbuyers. The purpose of the HUD-1 form is to show the source and recipient of the funds changing hands at settlement. The HUD-1 form thus requires a statement of the purchase price, the loan amount, and the closing costs to be paid or received by the seller and the buyer (called the "borrower" on the form). The portion of the HUD-1 form on which respondent was charged with making false statements was line 303, which is at the bottom of the first page of the form.[2] Line 303 is under a caption that says "cash at settlement from or to borrower"; line 303 itself consists of boxes to be checked indicating whether the borrower is to pay or receive money and a blank space to indicate how much. Pet. App. 3a-4a.

On the HUD-1 forms for three of respondent's transactions, the box "to" the borrower was checked; in one transaction, no box was checked; and in the rest, the box "from" the borrower was checked. Various amounts of money were entered on the blank spaces on line 303, ranging from relatively small amounts to several thousand dollars. On each form, respondent signed a certification that, "to the best of my knowledge and belief, [the HUD-1 form] is a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction." In all cases, however, the forms were false, because it was respondent, and not the borrower strawbuyer, who actually paid or received

[2] An example of that form is reproduced as an appendix to the court of appeals' en banc opinion. Pet. App. 24a-25a.

the cash amounts recorded on line 303. Pet. App. 4a-5a.

2. The district court instructed the jury that, to convict respondent on the false statement counts, the government was required to prove six elements: (1) respondent made or caused to be made a writing that contained a statement concerning a matter within HUD's jurisdiction; (2) the writing contained false, fictitious, and fraudulent statements; (3) respondent knew or should have known that the statement fell within HUD's jurisdiction; (4) respondent knew that the writing contained false, fictitious, and fraudulent statements; (5) respondent acted with the intent to influence HUD; and (6) the statements were material to the activities or decisions of HUD. J.A. 22-23, 27-28. With respect to the sixth element, the court instructed the jury that the statements charged in the indictment as false were material as a matter of law. J.A. 24, 29; see Pet. App. 5a, 58a.[3] Respondent did not object to that instruction. *Id.* at 19a. The jury convicted him of the Section 1001 charges. *Id.* at 2a.

3. A panel of the court of appeals reversed the false statement convictions. Pet. App. 51a-62a. It held that, under *United States* v. *Valdez*, 594 F.2d 725, 729 (9th Cir. 1979), materiality in a Section

---

[3] The jury was instructed as follows: "With reference to the sixth element, I instruct you that the making of a false statement to an agency of the United States Government is not an offense unless the statement made is a material statement. The issue of materiality, however, is not submitted to you for your decision but rather is a matter for the decision of the court. You are instructed that the statements charged in the indictment are material statements." J.A. 24, 29.

1001 prosecution must be decided by the jury. Pet. App. 57a-58a. It further held that the error was plain—and therefore could be raised for the first time on appeal—and was not harmless—and therefore required reversal of the convictions. *Id.* at 58a-62a.

4. On rehearing en banc, the Ninth Circuit, in a 6-5 ruling, reaffirmed its holding that materiality under Section 1001 is an issue to be decided by the jury. Pet. App. 1a-50a.

a. The majority noted that virtually every court that has addressed the issue has held that materiality under perjury and false statement statutes is a question of law for determination by the judge. Pet. App. 5a. Those decisions, the court observed, generally rely on *Sinclair* v. *United States*, 279 U.S. 263 (1929), which held that, in a prosecution for failing to answer a question "pertinent to the question under inquiry [by Congress]," the issue of pertinency is a legal issue for determination by the court. *Id.* at 299. The court of appeals concluded, however, that *Sinclair* does not compel the view that materiality in a Section 1001 prosecution is an issue for the court, because more recent decisions establish that the Constitution entitles a defendant to a jury determination, beyond a reasonable doubt, of the facts required to establish the elements of a crime. Pet. App. 6a-9a (citing, *inter alia*, *In re Winship*, 397 U.S. 358, 364 (1970); *Cabana* v. *Bullock*, 474 U.S. 376, 384-385 (1986); and *Sullivan* v. *Louisiana*, 113 S. Ct. 2078, 2082 (1993)). The court concluded that the proper decisionmaker on the issue of materiality must be determined in light of those constitutional considerations. Pet. App. 9a-14a.

The court then held that materiality is "an essential element of the offense prohibited by 18 U.S.C. § 1001,"

because the statute itself makes materiality an element of the crime. Pet. App. 11a. The court further held that, under the prevailing test for materiality—whether a statement "has a natural tendency to influence, or was capable of influencing, the decision of the decisionmaking body to which it was addressed" (*Kungys* v. *United States*, 485 U.S. 759, 770 (1988) (internal quotation marks omitted))—"[i]t would seem that a factual inquiry would nearly always be necessary to determine what makes a difference to the decisionmaking body." Pet. App. 12a. While statutes or regulations could define what is material, the court believed that, in the usual case, materiality is a "mixed question of law and fact." *Ibid.*[4] The court concluded that if materiality is a mixed question of law and fact under Section 1001, "it must be submitted to the jury" under the Sixth Amendment. *Id.* at 13a, 14a. The court added that, "[a]lthough we are confronted in this case with only the issue of whether materiality must be submitted to the jury in section 1001 cases, it seems to be courting constitutional error to withdraw the materiality question from the jury in other perjury and false statement cases." *Id.* at 14a.

The court of appeals recognized that this Court held in *Kungys* that materiality is a question of law to be resolved by the court, and that *Kungys* had

---

[4] The court stated, for example, that there were factual issues as to the materiality to the FHA of the misstatements on respondent's settlement statements (*i.e.*, HUD-1 forms). Later in its opinion, the court detailed why it thought that testimony of officials would be necessary to determine whether the misstatements on the settlement statements would have tended to influence any agency decision. Pet. App. 12a-14a.

relied on Section 1001 cases in reaching that conclusion. But the court distinguished *Kungys* as a denaturalization case, not a criminal case. According to the court of appeals, *Kungys* therefore did not have to address the constitutional issue under *Winship* of whether a court could determine an element of the crime as a matter of law. Pet. App. 14a-17a.

Finally, the court held that the error of failing to submit materiality to the jury is neither harmless nor barred from appellate review in this case by the plain error doctrine. Pet. App. 18a-22a.[5]

b. Judge Kozinski, writing for himself and four other judges, dissented. Pet. App. 26a-50a. He noted that, by holding that materiality is an issue for the jury in a prosecution under Section 1001, the court had "provoke[d] a conflict with every other regional circuit." *Id.* at 26a. He also criticized the majority for departing from the Court's holdings in *Sinclair* and *Kungys*, which he said are "directly on point." *Id.* at 28a. Finally, he explained that the majority had misinterpreted Section 1001 in holding that the issue of materiality depends on what facts actually would be considered by a decisionmaking body. *Id.* at 40a-43a.[6]

SUMMARY OF ARGUMENT

I. This Court's decisions and historical practice establish that the issue of materiality in a false statement prosecution under 18 U.S.C. 1001 is a question of law for the court, rather than an issue of fact for

---

[5] The court of appeals' holdings on plain error and harmless error are not at issue here.

[6] Judge Kozinski also disagreed with the majority that the error in this case met the requirements of the plain error doctrine. Pet. App. 26a, 43a-47a.

the jury. In *Sinclair* v. *United States*, 279 U.S. 263, 298 (1929), the Court observed that "the materiality of what is falsely sworn, when an element in the crime of perjury, is one for the court," and relied on that observation to reject the defendant's argument that, in a prosecution for an offense analogous to perjury, the issue of "pertinency" must be decided by the jury. In *Kungys* v. *United States*, 485 U.S. 759, 772 (1988), the Court similarly relied on the historical treatment of "materiality" in holding that, under the statute authorizing denaturalization for false statements made in applying for citizenship, the materiality of those statements is an issue of law for the court. The decisions in *Sinclair* and *Kungys* are consistent with a vast body of law, both in England and in this country, that has treated the issue of materiality as a legal matter for decision by the court.

Section 1001, like the statutes at issue in *Sinclair* and *Kungys*, proscribes an offense that is analogous to perjury; it punishes the intentional misrepresentation or concealment of facts that have the capacity to corrupt governmental processes. In accordance with *Sinclair*, *Kungys*, and the historical treatment of materiality in perjury prosecutions, Section 1001 is properly understood to treat the determination of materiality as a legal issue for the court.

II. The determination of materiality by the court as an issue of law is consistent with the requirements of the Constitution. Because the traditions in England and this country overwhelmingly endorse the assignment of the materiality determination to the court rather than the jury, there is a strong presumption that that practice is constitutional.

The court of appeals erred in holding that the determination of materiality by the court under Section 1001 violates the right recognized in *In re Winship*, 397 U.S. 358 (1970), to a jury determination of the facts constituting an offense beyond a reasonable doubt. The *Winship* principle is no novelty, but was well established at the time of the decision in *Sinclair*. And, although the defendant in *Sinclair* relied on that principle, the Court found it entirely valid to have materiality issues resolved by the court as "question[s] of law," 279 U.S. at 298. The same analysis holds true today: Because the *Winship* principle applies only to the *facts* necessary to constitute a criminal offense, it is inapplicable to the issue of materiality, which presents a question of *law* for decision by the court.

Nor does it violate any other principle of fundamental fairness to entrust the resolution of materiality issues to the court. The court of appeals' view that the determination of materiality is a classic jury question rests on a misunderstanding of the materiality requirement. Properly understood, that requirement focuses on the nature of the functions that the agency is authorized to perform, and the capacity of the misstatement to affect those functions. Those issues present legal questions. In addition, the court of appeals erred in stating that a question of law cannot involve the assessment of any facts whatsoever. To the extent that materiality requires consideration of facts, it is no different from other legal issues—for example, the admissibility of evidence—that are entrusted to the court and often require the assessment of facts. Finally, the court of appeals erred in attaching significance to the jury's ability to determine more complex questions than issues of

materiality. It is not the complexity, but the nature, of the issue that determines whether it is decided by the court or the jury. As this Court recently reaffirmed in *Kungys*, materiality is a legal issue, and the court may therefore determine it in a prosecution under Section 1001 without depriving the defendant of his right to a trial by jury.

ARGUMENT

THE MATERIALITY OF A FALSE STATEMENT UNDER 18 U.S.C. 1001 IS DETERMINED BY THE COURT RATHER THAN THE JURY

Section 1001 of Title 18 proscribes the making of "any false, fictitious or fraudulent statements or representations" in any matter within the jurisdiction of a federal department or agency. Like the first clause of Section 1001, which prohibits the concealment or covering up of information and is expressly limited to "material fact[s]," the false statement provision has long been interpreted to contain an implicit requirement of materiality.[7] Against the background

---

[7] See, *e.g.*, *United States* v. *Corsino*, 812 F.2d 26, 30 (1st Cir. 1987); *United States* v. *Lichenstein*, 610 F.2d 1272, 1278 (5th Cir.), cert. denied, 447 U.S. 907 (1980); *Paritem Singh Poonian* v. *United States*, 294 F.2d 74, 75 (9th Cir. 1961); *Freidus* v. *United States*, 223 F.2d 598, 601 (D.C. Cir. 1955) ("The legislative purpose strongly implies that only material false statements were contemplated, *i. e.*, statements that could affect or influence the exercise of a governmental function."). That interpretation of Section 1001 accords with this Court's treatment of similar language in 8 U.S.C. 1451(a) in *Kungys* v. *United States*, 485 U.S. 759, 767 (1988) (implying a materiality requirement into the misrepresentation provision governing denaturalization, based in part on the express materiality requirement in conceal-

of this Court's decisions and the historical treatment of materiality in perjury statutes, the materiality element of Section 1001 is properly resolved by the court as an issue of law.

I. MATERIALITY IS DETERMINED BY THE COURT AS A MATTER OF PRECEDENT AND HISTORY

This Court has twice addressed the materiality element of statutes that punished misrepresentations that could corrupt governmental processes. See *Sinclair* v. *United States*, 279 U.S. 263 (1929); *Kungys* v. *United States*, 485 U.S. 759 (1988). Like this case, *Sinclair* and *Kungys* presented the issue whether the determination of materiality was a question of law, to be decided by the court, or was instead a question of fact, to be decided by the jury (or the court as trier of fact). In both cases, the Court held that materiality was a question of law for the court. That conclusion reflects the judgment of history, and it is equally applicable to Section 1001.

A. *Sinclair* And *Kungys* Establish That Materiality Is Determined By The Court

1. In *Sinclair*, the defendant was charged under Rev. Stat. § 102 (2 U.S.C. 192). Section 102 made it a crime to refuse to answer "any question pertinent to the question under inquiry" by a congressional

---

ment clause); *id.* at 784 n.1 (Stevens, J., concurring). The Second Circuit, unlike the other circuits, does not consider materiality to be an element of the false statement offense created by the second clause of Section 1001, see *United States* v. *Elkin*, 731 F.2d 1005, 1009, cert. denied, 469 U.S. 822 (1984); *United States* v. *Silver*, 235 F.2d 375, 377-378, cert. denied, 352 U.S. 880 (1956), but it has held that the materiality of a fact under the cover-up clause of Section 1001 is determined by the court, see *Elkin*, 731 F.2d at 1009.

committee. 279 U.S. at 284-285. The trial court held that pertinency under Section 102 was a question of law to be decided by the court rather than a question of fact to be decided by the jury.[8] On appeal, the court of appeals certified to this Court the question whether pertinency under Section 102 was "a mixed question of law and fact for the determination of the Court and Jury, or was it solely a question of law?" [9]

This Court held that "[t]he question of pertinency under § 102 was rightly decided by the court as one of law." *Sinclair*, 279 U.S. at 298. The Court drew an analogy between the question of pertinency under Section 102 and two other determinations. First, pertinency "may be likened to [questions] concerning relevancy at the trial of issues in court." *Ibid.* The Court noted that "it is uniformly held that relevancy is a question of law." *Ibid.* The Court also stated that the question of pertinency was "not essentially different from the question as to materiality of false testimony charged as perjury." *Ibid.* In that setting, the Court observed, "the materiality of what is falsely sworn, when an element in the crime of perjury, is one for the court." *Ibid.* (citing *Carroll* v. *United States*, 16 F.2d 951 (2d Cir.), cert. denied, 273 U.S. 763 (1927); *United States* v. *Singleton*, 54 F. 488 (S.D. Ala. 1892); *Cothran* v. *State*, 39 Miss. 541, 547 (1860)).

The Court determined that "[t]he reasons for holding relevancy and materiality to be questions of law in cases such as those above referred to apply with

---

[8] Transcript of Record at 114-115, *Sinclair* v. *United States*, No. 555 (O.T. 1928).

[9] Certificate at 13, *Sinclair* v. *United States*, No. 555 (O.T. 1928); see also *Sinclair*, 279 U.S. at 284.

equal force to the determination of pertinency arising under § 102." *Sinclair*, 279 U.S. at 299. Accordingly, the Court held that "[i]t would be incongruous and contrary to well-established principles to leave the determination of [pertinency] to a jury." *Ibid.* In several subsequent decisions involving prosecutions under the same statute, the Court reiterated its holding in *Sinclair* that pertinency was a question of law to be decided by the court. *Russell* v. *United States*, 369 U.S. 749, 755-756 (1962); *Deutch* v. *United States*, 367 U.S. 456, 471 (1961); *Braden* v. *United States*, 365 U.S. 431, 436-437 (1961).

2. The Court reaffirmed the teaching of *Sinclair* in *Kungys* v. *United States*, *supra*, which addressed the related question whether "materiality" was an issue of law under a denaturalization provision. 485 U.S. at 772. *Kungys* arose under 8 U.S.C. 1451(a), which provides for the denaturalization of citizens whose citizenship orders and certificates of naturalization "were illegally procured or were procured by concealment of a material fact or by willful misrepresentation." The Court treated materiality as an implied requirement of the "misrepresentation" clause of Section 1451(a), 485 U.S. at 767 (citing *Fedorenko* v. *United States*, 449 U.S. 490, 507 n.28 (1981)), and held that materiality was an issue of law for determination by the court.

The Court observed in *Kungys* that the inclusion of a materiality requirement in false statement statutes has ancient origins. 485 U.S. at 769 (citing 3 E. Coke, *Institutes* 164 (6th ed. 1680), and 4 W. Blackstone, *Commentaries* *137 (both discussing perjury statutes)). The Court also noted that the "most prominent" modern federal statute that punishes "false statements to public officials" is 18 U.S.C. 1001,

which, like its "common-law antecedents," employs the term " 'material.' " 485 U.S. at 769-770. After defining the term "materiality" in 8 U.S.C. 1451(a) to accord with its "established meaning," 485 U.S. at 770-771, the Court turned to whether "materiality * * * is an issue of law, which we may decide for ourselves, or one of fact, which must be decided by the trial court." *Id.* at 772. "Here again," the Court said, "we see no reason not to follow what has been done with the materiality requirement under other statutes dealing with misrepresentations to public officers." *Ibid.*

To determine how materiality was treated in analogous contexts, the Court in *Kungys* looked to *Sinclair* and to case law concerning Section 1001. The Court noted that *Sinclair* had held that "[t]he materiality of what is falsely sworn, when an element in the crime of perjury, is one for the court." *Kungys*, 485 U.S. at 772 (quoting *Sinclair*, 279 U.S. at 298). The Court also quoted the Sixth Circuit's reasoning "in a case involving 18 U.S.C. § 1001":

> [A]lthough the materiality of a statement rests upon a factual evidentiary showing, the ultimate finding of materiality turns on an interpretation of substantive law. Since it is the court's responsibility to interpret the substantive law, we believe [it is proper to treat] the issue of materiality as a legal question.

Kungys, 485 U.S. at 772 (quoting, with bracketed language added, *United States* v. *Abadi*, 706 F.2d 178, 180, cert. denied, 464 U.S. 821 (1983)). Accordingly, the Court in *Kungys* concluded, as it had in *Sinclair*, that materiality under the false statement statute before it was to be decided by a court as an issue of law.

B. The Practice Of Having The Court Determine Materiality Has Deep Historical Roots

The holding of *Sinclair*, relied on in *Kungys*, that materiality requirements raise issues of law for determination by a court is supported by a long historical tradition. The law has long punished false statements to courts and to other governmental entities. From the earliest times, however, punishment has been reserved for false statements that are "material" —*i.e.*, statements that have the capacity to corrupt governmental processes. Also, from early times, the courts in England and this country have held that materiality is an issue of law to be decided by the court rather than the jury.

As this Court recognized in *Kungys*, in English law the materiality of a false statement has always been considered an element of perjury. 485 U.S. at 769. In the United States, the "English definition of perjury was, in the main, embraced by the colonists." R. Underwood, *False Witness: A Lawyer's History of the Law of Perjury*, 10 Ariz. J. Int'l & Comp. L. 215, 245 (1993). In particular, the early American treatises agreed that materiality is an element of perjury, see 2 J. Bishop, *Commentaries on the Criminal Law* § 860, at 570 (1858); F. Wharton, *A Treatise on the Criminal Law of the United States* 650-651 (2d ed. 1852); see also 2 Z. Swift, *A Digest of the Laws of the State of Connecticut* 320-322 (1823), even when a perjury statute does not expressly require proof of materiality, see, *e.g.*, Wharton, *supra*, at 648 n.(*b*); 48 C.J. *Perjury* § 2, at 820-821 (1929).

The great weight of authority in England held that materiality was a question for the court rather than the jury. Although the issue does not appear to have merited discussion in pre-nineteenth century deci-

sions, it became firmly established during that century that materiality in perjury prosecutions was for the court to decide. See 3 W. Russell, *A Treatise on Crimes and Misdemeanors* 22 n.(*w*) (5th ed. 1877) ("In every previous case materiality has been treated as a question of law, and it is submitted that it is clearly so."). Indeed, the English courts only began to discuss the issue after Lord Campbell decided to let the jury determine whether a statement charged as perjury was "material" in *Regina* v. *Lavey*, 3 Car. & K. 26, 30, 175 Eng. Rep. 448, 450 (Q.B. 1850). Judicial reaction was swift and negative. In *The Queen* v. *Courtney*, 5 Ir. R.-C.L. 434 (Ct. Cr. App. 1856), for example, when the defendant relied on *Lavey* for the proposition that the question of materiality was for the jury, all five judges rejected that rule and stated in dictum that materiality was virtually always a question for the judges. As Bishop Greene noted, "I should have little hesitation in adopting the view of my Brethren, that it has been the uniform practice of the Judge to detemine whether the particular matter was or was not material." *Id.* at 441-442.[10] In 1911, the issue was conclusively set-

---

[10] Similarly, in *Regina* v. *Gibbon*, Le. & Ca. 109, 169 Eng. Rep. 1324 (1861), a defendant convicted of perjury appealed, claiming that the false testimony was not admissible. The judges treated the issue as a question of law, and when the *Lavey* case was mentioned, Bishop Channell stated that "I never could understand that case * * *. [The facts] having been ascertained, the question of materiality was no longer for the jury." *Id.* at 1326; see also *Regina* v. *Southwood*, 1 F. & F. 356, 356, 175 Eng. Rep. 762, 762 (1858) ("The question of materiality is for me."). American treatise writers also rejected Lord Campbell's decision in *Lavey*. See note 13, *infra*.

tled by the enactment of a statute providing that "[t]he question whether a statement on which perjury is assigned was material is a question of law to be determined by the court of trial." Perjury Act 1911, § 1(6), 12 *Halsbury's Statutes of England and Wales* 162 (4th ed. 1994 reissue).

The courts in this country observed the same practice. The state courts, with virtual unanimity, adopted the principle of English law that materiality in perjury prosecutions is a question for the court rather than the jury. The earliest reported case on the question appears to be *Power* v. *Price*, 16 Wend. 450 (N.Y. 1836). In *Power*, New York's highest court held that a trial judge had correctly reserved the question of materiality to itself. The court explained (*id.* at 456):

> [T]he court was clearly right in instructing the jury that the testimony given on the former trial was proved to be material. The court, in this part of its charge, did not take from the jury the decision of any matter of fact which was proper for their cognizance: it merely decided a question of law, arising upon the proof of facts as to which there was no dispute or contrariety of testimony.

Subsequently, all but one nineteenth century state court to consider the issue reached the same conclusion.[11]

---

[11] See *Steinman* v. *McWilliams*, 6 Pa. (6 Barr) 170, 177-178 (1847); *Cothran* v. *State*, 39 Miss. 541, 547 (1860); *State* v. *Williams*, 30 Mo. 364, 367 (1860); *People* v. *Jones*, 1 Mich. N.P. (1 Brown) 141, 141 (Cir. Ct. 1869); *State* v. *Lewis*, 10 Kan. 157, 160 (1872); *Lawrence* v. *State*, 2 Tex. Crim. 479, 483-484 (1877); *Nelson* v. *State*, 32 Ark. 192, 198-199 (1877); *Renan* v. *Commonwealth*, 2 Ky. L. Rptr. 66, 66

Federal courts in the nineteenth century similarly held that materiality in a perjury case presented a question of law for the court. *United States* v. *Bedgood*, 49 F. 54, 60 (S.D. Ala. 1891) ("the question of materiality is for the court to decide, in view of the law as applicable to the particular proceeding"); *United States* v. *Singleton*, 54 F. 488, 489 (S.D. Ala. 1892) ("the question of materiality is for the court"); cf. *United States* v. *Landsberg*, 23 F. 585, 586-587 (C.C.S.D.N.Y. 1882) (on a motion for new trial, judge adopts per se rule that false statement is material if it was answering a question going to witness's credibility).[12] The prevailing rule was

---

(1880) (syllabus); *Gordon* v. *State*, 48 N.J.L. (19 Vroom) 611, 612 (1886); *State* v. *Hare*, 95 N.C. 682 (1886) (implicit); *Young* v. *People*, 134 Ill. 37, 42 (1890); *People* v. *Lem You*, 97 Cal. 224, 228-230 (1893); *State* v. *Caywood*, 96 Iowa 367, 374 (1895); *Peters* v. *United States*, 2 Okla. 138, 144 (1894) (applying federal law); *Barnes* v. *State*, 15 Ohio C.C. 14, 25-26 (1898); *Thompson* v. *People*, 26 Colo. 496, 504 (1899).

The sole exception was Louisiana, which initially adopted Lord Campbell's view that the question of materiality was for the jury, in part because "[t]he jury in Louisiana are judges of the law and the fact." *State* v. *Spencer*, 45 La. Ann. 1, 11-12 (1892). Soon thereafter, however, Louisiana retreated from the position that the jury should determine materiality, see *State* v. *Brown*, 111 La. 170, 172 (1903), and ultimately adopted the majority rule that materiality is a question of law for the court, see *State* v. *Occhipinti*, 358 So. 2d 1209, 1210 (La. 1978).

[12] In one early federal case, the report states that the government, relying on an unreported decision by Judge Lomax (a judge of the General Court of Virginia), argued that materiality was a fact to be ascertained by the jury. The court, however, did not reach the issue. *United States* v. *Cowing*,

summed up in *Carroll* v. *United States*, *supra*, which stated that whether the indictment charged "any 'material' matter was a question of law for the court, and was not for the jury," which is the same "rule [that] obtains in the state courts." 16 F.2d at 954. The *Carroll* decision was one of the perjury cases cited with approval by this Court in *Sinclair*. See 279 U.S. at 298 (citing *Carroll*).

Nineteenth century treatise writers confirmed that the issue of materiality in a perjury prosecution presented a question of law for the court to decide. As one leading treatise stated, "[t]he *facts* being proved, the question, whether they are material or not, is a question of *law*." 3 S. Greenleaf, *A Treatise on the Law of Evidence* § 195, at 183 n.5 (2d ed. 1853); accord Wharton, *supra*, at 656 ("On the question of perjury, the materiality of the facts testified to, is a question of law."); 2 J. Bishop, *Commentaries on the Law of Criminal Procedure* § 874, at 503-504 (1866) ("assuming this evidence [of the testimony's materiality] to be true, the question of materiality becomes one of law for the court, not of fact for the jury"); see also 2 J. Bishop, *Commentaries on the*

---

25 F. Cas. 680, 681 (C.C.D.C. 1835) (No. 14,880). Some federal decisions indicate that if the determination of materiality implicates disputed factual issues, the jury should determine those issues, but that the application of law to those facts remains the province of the court. See *United States* v. *Shinn*, 14 F. 447, 452 (C.C.D. Or. 1882) ("Where the facts are disputed, the question should be left to the jury, with proper instructions from the court. But when the facts are admitted the question of materiality is one for the court."); *United States* v. *Hall*, 44 F. 864, 867 (S.D. Ga. 1890) (jury charge: 'I charge you further, if you find from the evidence that [certain facts existed] his testimony on the

Criminal Law § 1039a, at 593 (7th ed. 1882).[13] Some commentators noted the jury's role in resolving factual disputes antecedent to the materiality determination but regarded it as settled by the end of the century that the ultimate determination of whether a false statement was material in a perjury case belonged to the court.[14]

---

occasion described would be in a matter material to the issue.").

[13] After Lord Campbell's decision in *Lavey* became known, the treatise writers incorporated it into their discussions. For example, Greenleaf, while retaining his previous statement that materiality was a question of law, also reported that "[i]t seems that the materiality of the matter assigned is a question for the jury. [citing, among other authorities, *Lavey*]. But see apparently *contra,* [two other English cases in which the court found materiality was for the judge]." 3 S. Greenleaf, *A Treatise on the Law of Evidence* § 195, at 189 n.(*b*) (14th ed. 1883). By 1899, Greenleaf again was reporting that "[w]hether the evidence was matrial or not was a question entirely for the court, and not at all for the jury." 3 S. Greenleaf, *A Treatise on the Law of Evidence* § 195, at 196 n.2 (16th ed. 1899).

Similarly, Wharton rejected *Lavey,* explaining:

> According to Lord Campbell, the materiality of the alleged false oath is for the jury. But the weight of authority is that it would be error to leave the question to the jury without definite instructions from the court. And the proper course is for the court, assuming all the evidence to be true, to determine whether the particular article of evidence is or is not material. Any dispute as to the truth of facts, however, must go to the jury.

2 F. Wharton, *A Treatise on Criminal Law* § 1548, at 170 (J. Kerr ed., 11th ed. 1912) (footnotes omitted); see also F. Wharton, *A Treatise on the Law of Evidence in Criminal Issues* § 86, at 270 (O.N. Hilton ed., 10th ed. 1912).

[14] In addition to sources previously cited in the text and notes 12 and 13, *supra,* see, *e.g.,* 4 B. Elliott & W. Elliott, *A*

C. Section 1001, Like Its Historical Antecedents, Assigns The Question Of Materiality To The Court

In accordance with *Sinclair* and *Kungys*, every regional court of appeals except the Ninth Circuit has held that materiality under 18 U.S.C. 1001 is a question of law for the court.[15] That conclusion is

---

Treatise on the Law of Evidence § 3073, at 386 (1905) ("Questions of fact are for the jury in perjury cases as in other criminal cases. But the question as to whether the alleged false testimony or oath upon which perjury is assigned is material within the rule in regard to perjury is generally held to be a question for the court."); 2 E. McClain, *A Treatise on the Criminal Law* § 866, at 89 (1897) ("The question as to whether the alleged false oath was material to the issues in the case in which it was taken is for the court and not the jury."). Only one treatise writer appeared to equivocate on that issue. See J. May, *The Law of Crimes* § 188, at 205 (1881) ("Whether materiality is a question of law for the court or of fact for the jury, is a point upon which the authorities are about equally divided."). But later editions of May's treatise found the issue to be resolved in favor of the court deciding materiality. See K. C. Sears & H. Weihofen, *May's Law of Crimes* § 93, at 119 (4th ed. 1938) ("Whether materiality is a question of law for the court, or of fact for a jury, is a point upon which the authorities are now generally agreed. It belongs to the court.").

[15] See *United States* v. *Corsino*, 812 F.2d 26, 31 n.3 (1st Cir. 1987); *United States* v. *Gribben*, 984 F.2d 47, 50-51 (2d Cir. 1993); *United States* v. *Greber*, 760 F.2d 68, 73 (3d Cir.), cert. denied, 474 U.S. 988 (1985); *United States* v. *Arch Trading Co.*, 987 F.2d 1087, 1095 (4th Cir. 1993); *United States* v. *Hausmann*, 711 F.2d 615, 616 (5th Cir. 1983); *United States* v. *Abadi*, 706 F.2d 178, 180 (6th Cir.), cert. denied, 464 U.S. 821 (1983); *United States* v. *Martel*, 792 F.2d 630, 637 (7th Cir. 1986); *United States* v. *Johnson*, 937 F.2d 392, 396 (8th Cir. 1991); *United States* v. *Daily*, 921 F.2d 994, 1004-1006 (10th Cir. 1990), cert. denied, 112 S. Ct. 405 (1991); *United States* v. *Lopez*, 728 F.2d 1359,

correct. The requirement of materiality in statutes criminalizing false statements to public officials stems from well-recognized common law traditions, see *Kungys*, 485 U.S. at 769, and, as shown above, it was settled by the beginning of this century that the issue of materiality in perjury prosecutions was a question to be decided by the court rather than the jury. Nothing in the text or history of Section 1001 suggests that Congress meant to depart from that tradition.

While the original antecedent of Section 1001 was enacted in 1863, see *United States* v. *Bramblett*, 348 U.S. 503, 504 (1955), the term "material" was first introduced into the provision that became Section 1001 by the Act of Oct. 23, 1918, ch. 194, 40 Stat. 1015. See *United States* v. *Yermian*, 468 U.S. 63, 70 & n.8 (1984).[16] By that time, prominent authorities had made clear that materiality in perjury statutes was an issue for the court. See pp. 16-21, *supra*.

1362 n.4 (11th Cir.), cert. denied, 469 U.S. 828 (1984); *United States* v. *Hansen*, 772 F.2d 940, 950-951 (D.C. Cir. 1985) (Scalia, J.), cert. denied, 475 U.S. 1045 (1986).

[16] As amended in 1918, Section 35 of the Criminal Code in relevant part punished with a fine, imprisonment, or both (40 Stat. 1015-1016 (emphasis added))

> whoever, for the purpose of obtaining or aiding to obtain the payment or approval of [a false, fictitious, or fraudulent] claim, or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, *shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations.*

The predecessor of Section 1001 was made explicitly applicable to false statements "in any matter within the jurisdiction" of the federal government and put substantially in its current form by the Act of June 18, 1934, ch. 587, 48 Stat. 996; see *Yermian*, 468 U.S. at 70-73; *United States* v. *Rodgers*, 466 U.S. 475, 477-478 (1984); *Bramblett*, 348 U.S. at 506-508; *United States* v. *Gilliland*, 312 U.S. 86, 92-95 (1941).

At no point did Congress suggest that it intended to veer from the prevailing common law treatment of materiality as an issue of law for resolution by the court. In the absence of evidence to the contrary, Congress is presumed to have adopted that tradition as part of the "cluster of ideas" surrounding the concept of materiality in analogous state and federal perjury statutes. See *Morissette* v. *United States*, 342 U.S. 246, 263 (1952) ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.").

Indeed, in *Kungys* this Court applied the same reasoning in construing the term "materiality" in 8 U.S.C. 1451(a). After quoting the definition of materiality applied under other federal statutes, including Section 1001, the Court held that "[w]here Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." 485 U.S. at 770

(quoting *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 329 (1981)); see also *Molzof* v. *United States*, 112 S. Ct. 711, 716 (1992). Perjury laws and Section 1001 have similar purposes,[17] and the two statutes employ the requirement of materiality for a similar function.[18] In light of the uniform treatment in perjury statutes of materiality as a question for the court, Section 1001 is correctly read to assign the determination of materiality to the court as an issue of law.

II. THE DETERMINATION OF MATERIALITY BY THE COURT IS CONSTITUTIONAL

The court of appeals concluded that the resolution of the issue of materiality by the court rather than the jury violates a criminal defendant's right under the Fifth Amendment's Due Process Clause and the Sixth Amendment's jury trial guarantee to have "the

---

[17] Both statutes punish falsehoods that have the capacity to corrupt decisionmaking by government bodies or tribunals. See *United States* v. *Rodgers*, 466 U.S. at 480 (Section 1001 "protect[s] the authorized functions of governmental departments and agencies from the perversion which might result from * * * deceptive practices"); *Bronston* v. *United States*, 409 U.S. 352, 357 (1973) (perjury statute "keep[s] the course of justice free from the pollution of perjury"); *Freidus* v. *United States*, 223 F.2d 598, 601 n.10 (D.C. Cir. 1955) (noting close kinship between Section 1001 and perjury statutes).

[18] In each setting, the materiality requirement excludes from liability statements that, although false, could not tend to undermine the governmental process. Compare, *e.g.*, *Weinstock* v. *United States*, 231 F.2d 699, 701-702 & n.6 (D.C. Cir. 1956) (construing Section 1001) with *Carroll*, 16 F.2d at 953 (construing perjury statute).

facts essential to establish the elements of a crime * * * decided by a jury" beyond a reasonable doubt. Pet. App. 6a. That conclusion is unfounded. The long tradition in this country that the issue of materiality is determined by the court as a matter of law creates a strong presumption that the practice is constitutional. In this case, neither the modern articulation of the jury's role in a criminal case in decisions such as *In re Winship*, 397 U.S. 358 (1970), nor considerations of fairness provide a basis for invalidating the traditional rule under the Constitution. The question of materiality requires determinations of law, and those legal issues fall outside of the jury's classic province.

A. The Historical Allocation Of Materiality To The Court Attests To Its Constitutionality

"As this Court has stated from its first Due Process cases, traditional practice provides a touchstone for constitutional analysis." *Honda Motor Co.* v. *Oberg*, 114 S. Ct. 2331, 2339 (1994); see *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856).[19] That principle has often been applied in evaluating constitutional attacks on criminal laws and procedures. For example, this Court has given traditional practice great weight in due process challenges involving "the permissible limits in defining criminal conduct." *Schad* v. *Arizona*, 501 U.S. 624, 631 (1991) (plurality opinion). It has also relied heavily on historical practice in considering due process challenges to the manner in

---

[19] The Due Process Clause of the Fifth Amendment provides: "No person shall * * * be deprived of life, liberty, or property, without due process of law."

which a State has allocated the burden of proof under a criminal statute. See, *e.g.*, *Medina* v. *California*, 112 S. Ct. 2572, 2577-2578 (1992); *Martin* v. *Ohio*, 480 U.S. 228, 235-236 (1987); *Patterson* v. *New York*, 432 U.S. 197, 202-211 (1977). Such reliance on history "recognize[s] the high probability that legal definitions, and the practices comporting with them, are unlikely to endure for long, or to retain wide acceptance, if they are at odds with notions of fairness and rationality sufficiently fundamental to be comprehended in due process." *Schad*, 501 U.S. at 642 (plurality opinion); *Medina*, 112 S. Ct. at 2582 (O'Connor, J., concurring in the judgment) ("historical pedigree can give a procedural practice a presumption of constitutionality"); see *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 17-18 (1991).

Historical endorsement of a practice challenged on due process grounds is not dispositive of the challenge. See *Medina*, 112 S. Ct. at 2578; *id.* at 2582 (O'Connor, J., concurring in the judgment); *Schad*, 501 U.S. at 642-643 (plurality opinion). The resolution of the due process issue also encompasses an inquiry into whether the practice "transgresses any recognized principle of 'fundamental fairness.'" *Medina*, 112 S. Ct. at 2578 (quoting *Dowling* v. *United States*, 493 U.S. 342, 352 (1990)); see *Schad*, 501 U.S. at 642 (plurality opinion). When the endorsement of history is as longstanding and widespread as it is here, however, it is not likely that the practice "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina*, 112 S. Ct. at 2577 (quoting *Patterson*, 432 U.S. at 202).

History is likewise significant in deciding whether the determination of materiality by the court in-

fringes the jury trial guarantee of the Sixth Amendment.[20] This Court has construed the constitutional right to a jury trial in light of the practices observed in criminal jury trials when the Constitution was ratified and in later years. See *Holland* v. *Illinois*, 493 U.S. 474, 481 (1990) (relying on "unbroken tradition" of common and statutory law in construing the right to an "impartial jury"). "The process of determining the content of the Sixth Amendment right to jury trial has long been one of careful evaluation of, and strict adherence to the limitations on, that right as it was known in criminal trials at common law." *Johnson* v. *Louisiana*, 406 U.S. 356, 370 n.6 (1972) (opinion of Powell, J.). When this Court has "turn[ed] to other than purely historical considerations," it has done so in addressing the constitutionality of departures from the common law characteristics of a jury. *Williams* v. *Florida*, 399 U.S. 78 (1970) (upholding criminal jury composed of fewer than 12 jurors); see *Apodaca* v. *Oregon*, 406 U.S. 404, 407-414 (1972) (opinion of White, J.) (upholding state law providing for less than unanimous verdict).

In this case, historical practice creates a powerful presumption that neither the Fifth nor the Sixth Amendment requires a jury determination of materiality. As we have discussed, the nearly universal approach to the issue in English and American cases and commentary assigned the determination of materiality in a perjury case to the court as a question

---

[20] The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

of law. See pp. 16-21, *supra*. This Court reaffirmed that view in *Sinclair* v. *United States*, *supra*, based on the long historical tradition and the rationales supporting it. And "[c]ontemporary practice, while of limited relevance to the due process inquiry," *Medina*, 112 S. Ct. at 2578, see *Patterson*, 432 U.S. at 211, has generally adhered to that approach, as reflected in decisions of the state courts [21] and the

---

[21] In the last 25 years, 11 state supreme courts have held that materiality is an issue for the judge. See *State* v. *Rosenbaum*, No. 974-93, 1994 WL 665576 (Tex. Crim. App. 1994) (en banc); *Gullett* v. *State*, 523 So. 2d 296, 300 (Miss. 1988); *State* v. *West*, 419 So. 2d 868, 874 (La. 1982); *State* v. *Hanson*, 302 N.W.2d 399, 401 (N.D. 1981); *State* v. *Lunney*, 400 A.2d 759, 763 (Me. 1979) (construing state perjury statute expressly assigning materiality to court); *State* v. *Thompson*, 576 P.2d 1105, 1107 (Mont. 1978) (same); *State* v. *Edgington*, 573 P.2d 1059, 1064 (Kan. 1978); *Williams* v. *State*, 535 S.W.2d 842, 845 (Ark. 1976); *State* v. *Deets*, 195 N.W.2d 118, 122 (Iowa 1972); *Wolfe* v. *State*, 271 So. 2d 132, 133 (Fla. 1972). During the same period, intermediate appellate courts in six other States reached the same conclusion. *People* v. *Powell*, 513 N.E.2d 1162, 1165-1166 (Ill. App. Ct. 1987), appeal denied, 520 N.E.2d 391 (Ill.), cert. denied, 486 U.S. 1025 (1988); *State* v. *Albin*, 720 P.2d 1256, 1259 (N.M. Ct. App.), cert denied, 719 P.2d 1267 (N.M. 1986); *People* v. *Hoag*, 318 N.W.2d 579, 583 (Mich. Ct. App. 1982); *Commonwealth* v. *Lafferty*, 419 A.2d 518, 521 (Pa. Super. Ct. 1980); *State* v. *Roberson*, 543 S.W.2d 817, 820 (Mo. Ct. App. 1976); *State* v. *Daniels*, 520 P.2d 178, 179 (Wash. Ct. App.), review denied, 84 Wash. 2d 1002 (1974). In three additional States, the state supreme court made the same holding while rejecting a claim that allocating materiality to the judge violated the defendant's due process and Sixth Amendment rights. See *State* v. *French*, 509 N.W.2d 698, 700-702 (S.D. 1993); *State* v. *Strand*, 720 P.2d 425, 431 (Utah 1986); *People* v. *Smith*, 597 P.2d 204, 205-206 (Colo. 1979). The highest courts in only two States have found that leaving the ques-

federal courts.[22]

---

tion of materiality for the judge violates due process and the Sixth Amendment. See *State* v. *Anderson*, 603 A.2d 928, 932-935 (N.J. 1992); *Commonwealth* v. *McDuffee*, 398 N.E.2d 463, 467-470 (Mass. 1979). Contrary to the court of appeals' suggestion, Pet. App. 9a, California has not definitively resolved the issue. See *People* v. *Hedgecock*, 795 P.2d 1260, 1267 (Cal. 1990) (addressing "materiality" under campaign finance law; distinguishing materiality in perjury statutes, and "express[ing] no view whether in perjury prosecutions based on false testimony at a judicial or legislative proceeding the question of materiality is a jury issue").

We also note that the perjury statute in the Model Penal Code states: "Whether a falsification is material in a given factual situation is a question of law." 2 American Law Institute, *Model Penal Code & Commentaries* § 241.1(2), at 93 (1980). Likewise, the perjury statute proposed by the National Conference of Commissioners on Uniform State Laws states: "[W]hether a statement was material * * * is a question of law to be determined by the court." Model Act on Perjury § 4(2). See American Law Institute, *Model Penal Code (Tentative Draft No. 6)* App., at 160 (1957).

[22] Every regional court of appeals, including the Ninth Circuit, has held that materiality is a question of law to be decided by the court in prosecutions under 18 U.S.C. 1623, which punishes the making of false statements to a court or grand jury. See Pet. App. 32a-33a (citing cases). There is similar uniformity with respect to other statutes punishing false statements to governmental entities. The Ninth Circuit and six other courts of appeals have held that materiality of perjured statements under 18 U.S.C. 1621 is decided by the court. See *United States* v. *Clark*, 918 F.2d 843, 845-846 (9th Cir. 1990); *United States* v. *Alu*, 246 F.2d 29, 32 (2d Cir. 1957); *United States* v. *Forrest*, 623 F.2d 1107, 1112-1113 (5th Cir.), cert. denied, 449 U.S. 924 (1980); *United States* v. *Giacolone*, 587 F.2d 5, 6 (6th Cir. 1978), cert. denied, 442 U.S. 940 (1979); *United States* v. *Rivera*, 448 F.2d 757, 758 (7th Cir. 1971); *Masinia* v. *United States*, 296 F.2d 871, 874 (8th Cir. 1961); *United States* v. *Masters*,

Against that background, it would take a considerable showing of fundamental unfairness to justify rejection of the historical approach to materiality. Here, no such showing has been made.

B. The Principles Of *In Re Winship* Do Not Require Departure From Longstanding Practice

The court of appeals declined to follow this Court's statement in *Sinclair* that materiality is a question for the court rather than the jury, because the court believed that *Sinclair* does not "survive the more recent holdings of the Supreme Court that the Sixth Amendment and the Due Process Clause require that the facts essential to establish the elements of a crime must be decided by a jury." Pet. App. 6a. The Ninth Circuit identified the earliest decision so holding as *In re Winship*, *supra*. See Pet. App. 6a; see also *id.* at 9a, 15a-16a. *Winship*, however, provides no support for casting aside the historical treatment of materiality as an issue of law for the court.

---

484 F.2d 1251, 1254 (10th Cir. 1973). Seven courts of appeals, including the Ninth Circuit, have also held that materiality is for the court to decide in cases of false statements in tax returns, 26 U.S.C. 7206(1). See *United States* v. *Romanow*, 509 F.2d 26, 28 (1st Cir. 1975); *United States* v. *Greenberg*, 735 F.2d 29, 31 (2d Cir. 1984); *United States* v. *Taylor*, 574 F.2d 232, 235 (5th Cir.), cert. denied, 439 U.S. 893 (1978); *United States* v. *Haynes*, 573 F.2d 236, 240 (5th Cir.), cert. denied, 439 U.S. 850 (1978); *United States* v. *Whyte*, 699 F.2d 375, 379 (7th Cir. 1983); *United States* v. *Flake*, 746 F.2d 535, 537-538 (9th Cir. 1984), cert. denied, 469 U.S. 1225 (1985); *United States* v. *Strand*, 617 F.2d 571, 573-574 (10th Cir.), cert. denied, 449 U.S. 841 (1980); *United States* v. *Gaines*, 690 F.2d 849, 858 (11th Cir. 1982); but see *United States* v. *Null*, 415 F.2d 1178, 1181 (4th Cir. 1969) (submitting issue to jury).

1. *Winship* concerned whether, in determining whether a juvenile had committed a crime and should therefore be declared a delinquent, a State had to meet the standard of proof applicable in a criminal trial—proof beyond a reasonable doubt. 397 U.S. at 359. As an initial matter, the Court confirmed that due process requires the government to meet the reasonable doubt standard in a criminal trial.

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

Id. at 364. The Court then determined that the "same considerations" that require proof beyond a reasonable doubt in criminal trials also require the application of that standard in juvenile delinquency proceedings. *Id.* at 365.

The holding of *Winship* has no direct application in this case; the question presented here does not concern the degree of proof that the government must meet with regard to a particular factual question in a criminal proceeding. Instead, it concerns whether the issue of materiality is one of law for decision by the court, or one of fact for decision by the jury. *Winship* did not address the standards for distinguishing questions of law from issues of fact.[23]

---

[23] No decision of this Court has applied *Winship* for that purpose. Most decisions of this Court applying *Winship* fall into one of two categories, each of which concerns the burden of proof. In one category are cases in which a criminal defendant challenges the manner in which a State has allo-

Although the *Winship* principle is sometimes broadly described as requiring the jury to decide "all the elements of a criminal offense," *e.g.*, *Estelle* v. *McGuire*, 112 S. Ct. 475, 480 (1991); see *Victor* v. *Nebraska*, 114 S. Ct. 1239, 1242 (1994); *Patterson* v. *New York*, 432 U.S. 197, 210 (1977), the principle actually applies to only the factual components of the essential elements. Pet. App. 8a n.1. As the Court explained in *Sullivan* v. *Louisiana*, 113 S. Ct. 2078 (1993), "[t]he prosecution bears the burden of proving all elements of the offense charged, and must persuade the factfinder beyond a reasonable doubt of the facts necessary to establish each of those elements." *Id.* at 2080 (internal quotation marks and citations omitted); see also *County Court* v. *Allen*, 442 U.S. 140, 156 (1979) (equating "an element of the crime" to "an 'ultimate' or 'essential' fact," as distinguished from " 'evidentiary' or 'basic' facts"); *Patterson*, 432 U.S. at 206 (due process requires that "the facts constituting a crime [be] established beyond a reasonable doubt"); *Winship*, 397 U.S. at 364 (reasonable doubt standard reduces margin of "error in factfinding" for defendant).

The principle that the jury decides the facts constituting an offense, while the court decides issues of law, was established long before *Winship*. It was settled by this Court in *Sparf & Hansen* v. *United*

---

cated the burden of proof with respect to a particular fact in a criminal trial. See, *e.g.*, *Sandstrom* v. *Montana*, 442 U.S. 510 (1979). The other category comprises cases involving non-criminal proceedings in which it is claimed that due process requires a higher standard of proof than the "preponderance of the evidence" standard usually applied in such proceedings. See, *e.g.*, *Santosky* v. *Kramer*, 455 U.S. 745 (1982).

States, 156 U.S. 51, 105-106 (1895). See *Johnson* v. *Louisiana*, 406 U.S. 356, 370 n.6 (1972) (opinion of Powell, J.) (citing *Sparf* for the "fact-law" allocation of decisionmaking between jury and judge); *Sullivan* v. *Louisiana*, 113 S. Ct. at 2080 (same); J. Thayer, *A Preliminary Treatise on Evidence at the Common Law* 256 & n.2 (reprint 1969) (1898) (same); see also *Davis* v. *United States*, 160 U.S. 469, 493 (1895). In England, the principle has been traced to statements by Lord Coke in the sixteenth century. See, *e.g.*, Thayer, *supra*, at 185; 9 J. Wigmore, *Evidence* § 2549, at 640 (J. Chadbourn rev. ed. 1981). In civil actions in this country, the jury's authority to find facts is reflected in the Seventh Amendment's provision that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

By the time of the decision in *Sinclair*, the principle had been stated "over and over again." Brief for Appellant at 109, *Sinclair* v. *United States*, No. 555 (O.T. 1928); see also *id.* at 110 (citing, among other authorities, *Sparf*, *supra*); 1 T. Cooley, *A Treatise on Constitutional Limitations* 678 & n.3 (W. Carrington ed., 8th ed. 1927) (treating as "settled" the "independence of the jury, with respect to the matters of fact in issue before them"). Indeed, the defendant in *Sinclair* presented a constitutional argument that parallels respondent's argument in this case. The defendant in *Sinclair* claimed that the trial court's failure to submit the question of pertinency to the jury violated the Sixth Amendment. He argued that, under that Amendment, "it has been said over and over again, that every essential ingredient of the crime must be proven to the satisfaction of the jury

beyond a reasonable doubt." Brief for Appellant at 109, *Sinclair* v. *United States*, No. 555 (O.T. 1928) (citing *Egan* v. *United States*, 52 App. D.C. 384, 393 (1923); *Agnew* v. *United States*, 165 U.S. 36 (1897)); see also *id.* at 110 (quoting *Sparf, supra*); *Sinclair*, 279 U.S. at 276-277 (argument for appellant); *id.* at 291. He further argued that, because the pertinency of the questions that he refused to answer was an essential element of the crime with which he was charged, "[t]he court, in withdrawing from the jury the question of pertinency * * * denied [him] the right of trial by jury." Brief for Appellant at 107, *Sinclair* v. *United States*, No. 555 (O.T. 1928).

In rejecting the defendant's argument that "pertinency" was a jury issue, *Sinclair* necessarily held that the constitutional principles on which the defendant relied did not undermine the traditional rule that legal questions, like the issue of materiality, are within the province of the court to decide.[24] *Sinclair*,

---

[24] *Sinclair* is not distinguishable on the basis that it involved "pertinency" under Rev. Stat. § 102, whereas the present case involves "materiality" under 18 U.S.C. 1001. *Sinclair* itself drew an analogy between Section 102's "pertinency" requirement and the materiality requirement in perjury prosecutions, an analogy that this Court reiterated in *Kungys* v. *United States*, with specific reference to the materiality requirement of Section 1001. 485 U.S. at 772. Nor is *Sinclair* distinguishable based on the Ninth Circuit's view that "materiality" is an element of proof under Section 1001, in the sense that the prosecution must plead and prove it. Pet. App. 10a-12a. The Court in *Sinclair* similarly determined that "pertinency" was an element of the prosecution's case, in the sense that it was "incumbent upon the United States to plead and show that the question [that the defendant refused

therefore, does not conflict with the principles that the court of appeals discerned in the *Winship* line of cases.[25] Now, as when *Sinclair* was decided, those principles do not justify a departure from the allocation of materiality in a false statements case to the court.

2. There is, of course, an intersection between *Winship*'s holding regarding the burden of proof in a criminal case and the allocation of legal and factual issues between court and jury as stated in *Sparf*. The Court held in *Sparf* that the jury (rather than the court) must be convinced of the existence of the facts necessary to establish the elements of the offense with which the defendant was charged, and *Winship* removes any doubt that the standard of proof governing the jury's determination of those

---

to answer] pertained to some matter under investigation." 279 U.S. at 296-297; see *Russell* v. *United States*, 369 U.S. 749, 755 (1962).

[25] Even the major holding of *Winship*—that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged" (397 U.S. at 364)—was not an innovation. "Long before *Winship*, the universal rule in this country was that the prosecution must prove guilt beyond a reasonable doubt." *Patterson*, 432 U.S. at 211. *Winship* itself acknowledged that "[e]xpressions in many opinions of this Court indicate that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required." 397 U.S. at 362 (citing, *inter alia*, *Miles* v. *United States*, 103 U.S. 304, 312 (1881); *Davis* v. *United States*, 160 U.S. 469, 488 (1895); *Holt* v. *United States*, 218 U.S. 245, 253 (1910); *Wilson* v. *United States*, 232 U.S. 563, 569-570 (1914)). Such a firmly rooted principle could not have escaped the Court's attention when it decided *Sinclair*.

facts is beyond a reasonable doubt. As this Court has thus noted, "the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated." *Sullivan*, 113 S. Ct. at 2081. But the Ninth Circuit erroneously conflated the two requirements in an attempt to justify its refusal to follow *Sinclair* in light of the "later pronouncements in *Winship* through *Sullivan*." Pet. App. 16a.

There is no tension between *Sinclair* and the principle that the jury in a criminal trial must decide the facts constituting the offense. See Pet. App. 29a (Kozinski, J., dissenting); accord *United States* v. *Daily*, 921 F.2d 994, 1005-1006 & n.14 (10th Cir. 1990), cert. denied, 112 S. Ct. 405 (1991); *United States* v. *Paxson*, 861 F.2d 730, 732 (D.C. Cir. 1988); *United States* v. *Abadi*, 706 F.2d at 180 n.2. As explained above, *Sinclair* determined that materiality in a prosecution for perjury was a question of *law* rather than a question of fact; *Kungys* reaffirmed that determination and found support for it in cases arising under Section 1001. Because materiality is a question of law rather than a question of fact, it need not be submitted to the jury.

For the same reason, materiality need not be proven beyond a reasonable doubt under *Winship*. See, *e.g.*, *United States* v. *Gribben*, 984 F.2d 47, 50-51 (2d Cir. 1993); *United States* v. *Abroms*, 947 F.2d 1241, 1246-1247 & n.5 (5th Cir. 1991) (citing cases), cert. denied, 112 S. Ct. 2992 (1992). Indeed, a question of law, by its nature, is not susceptible to proof by various quanta of evidence. *United States* v. *Watson*, 623 F.2d 1198, 1202 (7th Cir. 1980). One may have varying levels of confidence in a legal determination, but levels of confidence differ from degrees of proof.

Cf. *Jackson* v. *Virginia*, 443 U.S. 307, 315-319 & n.11 (1979) (*Winship* requirement of proof beyond a reasonable doubt refers not only to level of certainty required of factfinder but also to "the actual quantum and quality of proof necessary to support a criminal conviction").[26]

Nor is there any conflict between *Sinclair* and decisions of this Court applying *Winship* in criminal cases. All of those decisions addressed statutes or jury instructions affecting the burden of proof with regard to questions of fact, not questions of law. Most have concerned the question of the defendant's intent, "a question of fact which must be submitted to the jury." *Morissette*, 342 U.S. at 274.[27] These

---

[26] Although some language in *Kungys* indicates that materiality under 8 U.S.C. 1451(a) must be proven by clear and convincing evidence, 485 U.S. at 771-772, the standard of proof was not at issue in *Kungys* and the decision cited in *Kungys* for that proposition makes clear that the "clear and convincing" standard applies not to materiality, but to the ultimate factual issue of whether naturalization was illegally procured. See *Schneiderman* v. *United States*, 320 U.S. 118, 158 (1943); see also *Chaunt* v. *United States*, 364 U.S. 350, 353-354 (1960).

[27] See *Carella* v. *California*, 491 U.S. 263, 264 (1989) (per curiam) (statutory presumptions of embezzlement and intent to commit theft by fraud); *Francis* v. *Franklin*, 471 U.S. 307, 309 (1985) (jury instructed that the acts of sane person are presumed to be the product of will, and that a person is presumed to intend the natural and probable consequences of his or her acts); *Connecticut* v. *Johnson*, 460 U.S. 73, 78 (1983) (opinion of Blackmun, J.) (jury instructed that "every person is conclusively presumed to intend the natural and necessary consequences of his act"); *Sandstrom* v. *Montana*, 442 U.S. 510, 513 (1979) (jury instructed that "the law presumes that a person intends the ordinary consequences

post-*Winship* decisions are relevant here only in establishing that the Due Process Clause leaves a legislature broad discretion to define crimes. See, *e.g.*, *Patterson*, 432 U.S. at 210. Nothing in those decisions suggests that Congress exceeded its discretion in Section 1001 by assigning the materiality question to the court.

The post-*Winship* decisions actually support the validity of Section 1001's assignment of materiality to the court. It is clear from those decisions that Congress could have prohibited *all* false statements within the department or agency's jurisdiction, without regard to their materiality. Cf. *Patterson*, 432 U.S. at 209 (New York could have punished all intentional murders, without recognizing any affirmative defenses). Congress also could have punished all such false statements but made immateriality a defense. Cf. *ibid.* As a further alternative, Congress could have made immateriality a factor "affecting * * * the severity of the punishment," *id.* at 207, for consideration by the sentencing court. Cf. *McMillan* v. *Pennsylvania*, 477 U.S. 79, 85-86 (1986). In light

---

of his voluntary acts"); *Patterson*, 432 U.S. at 198 (statute creating affirmative defense to homicide that defendant "acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse"); *Mullaney* v. *Wilbur*, 421 U.S. 684, 688 (1975) (presumption of implied malice aforethought in homicide prosecutions); see also *McMillan* v. *Pennsylvania*, 477 U.S. 79, 81 n.1 (1986) (mandatory minimum sentence for visible possession of firearm during offense); *County Court*, 442 U.S. at 142 (statutory presumption that firearm was in possession of people in vehicle where firearm was found); *Cool* v. *United States*, 409 U.S. 100, 100 (1972) (per curiam) (jury instruction allowing jury to ignore defense testimony unless it believed beyond a reasonable doubt that testimony was true).

of the options open to Congress, it is difficult to conclude that the one option foreclosed to it was assigning determination of materiality to the court.[28]

C. The Determination Of Materiality By The Court Is Not Fundamentally Unfair

Finally, the resolution of the issue of materiality by the judge as a matter of law does not violate "any recognized principle of 'fundamental fairness.'" *Medina*, 112 S. Ct. at 2578 (quoting *Dowling*, 493 U.S. at 352). The Ninth Circuit's contrary conclusion rested on its rejection of this Court's determination in *Sinclair* and *Kungys* that materiality is a question of law. The court of appeals considered materiality under Section 1001 to be a factbound question particularly well-suited to jury determination. See Pet. App. 17a (jury "is entitled to believe or disbelieve the testimony of [government] officials" that a particular misstatement of fact would have had a natural tendency to influence the decision of the government entity). While there is no infallible logical test for viewing a question as one of fact or one of law, see Thayer, *supra*, at 183-262; W. Prosser, *Handbook on the Law of Torts* 205 (4th ed. 1971), "a

---

[28] That option, unlike the federal statutory presumptions that this Court has struck down, does not relieve the prosecution of any burden of proof otherwise imposed by the statute. Cf. *Turner* v. *United States*, 396 U.S. 398, 407 n.8 (1970) (rejecting argument that, since Congress could make mere possession of imported drugs a crime, it was permissible for Congress to make it illegal for person to possess imported drugs, knowing them to be imported, with statutory presumption of knowledge triggered by fact of possession); *Leary* v. *United States*, 395 U.S. 6, 34, 37 (1969) (same); *Tot* v. *United States*, 319 U.S. 463, 472 (1943) (same).

page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U.S. 345, 349 (1921). As discussed above, history has consistently classified materiality as a question of law for the court. The court of appeals did not identify any compelling reason to reverse that historical judgment.

1. In classifying materiality under Section 1001 as a factbound question, the court of appeals acted on a misunderstanding of the materiality requirement. See Pet. App. 12a-14a, 17a-18a. The court of appeals believed that "a factual inquiry would nearly always be necessary to determine what makes a difference to the decisionmaking body." *Id.* at 12a. The court thus thought it "necessary" in this case "to take testimony of department officials in order to determine whether the block checked on line 303 of the settlement statement would tend to influence the agency's decision to insure the loan." *Id.* at 17a. The court doubted, in light of the "trivial" sums that were entered on line 303 of the settlement statement, that "the particular block checked on line 303" would "have any tendency to influence the agency's decision." *Id.* at 17a-18a.

As the judges dissenting below observed, however, the majority required "too fact-specific an inquiry." Pet. App. 41a. "[A] concealment or misrepresentation is material if it 'has a natural tendency to influence, or was capable of influencing, the decision of' the decisionmaking body to which it was addressed." *Kungys*, 485 U.S. at 770 (quoting *Weinstock* v. *United States*, 231 F.2d 699, 701-702 (D.C. Cir. 1956)). As the dissent explained, under that standard, "[t]he proper question is whether false entries on a key line of a government-approved loan

application have 'a natural tendency to affect' the agency's decision, regardless of the amount in question." Pet. App. 41a. That question calls for "a generalized determination * * * that does not vary significantly with the facts of each individual transaction." *Id.* at 42a-43a.[29]

Every legal determination "must, of course, be factually anchored to the case where it is applied." Pet. App. 40a (Kozinski, J., dissenting). Here, for example, the materiality determination requires an understanding of facts about the operation of the loan insurance program that respondent defrauded. Most such facts may be gleaned from the statute and regulations authorizing the program. The district court also had discretion to hear testimony about the loan program by agency officials. The taking of such testimony, however, did not transform the ultimate determination of materiality into a jury question. See *id.* at 17a; see also *id.* at 12a. The court of appeals' contrary view rested on the erroneous premise that materiality may be decided by the court, rather than the jury, "[o]nly if it can be said that there is *no* factual component to the determination of materiality." *Id.* at 13a (emphasis added). As the dissent recognized (*id.* at 40a), many other legal determina-

---

[29] Of course, there may be factual disputes antecedent to the materiality determination that would be resolved by the jury because they related to an element of the offense. See p. 21, *supra*. For example, the materiality of a statement may depend on the precise contents of the statement, a matter that may be disputed if the statement was made orally. In that situation, the jury should be allowed to resolve the dispute.

tions that are made by the court rather than the jury require subsidiary factual determinations.[30]

The court of appeals correctly observed that judges "frequently submit far more complex questions [than materiality] to juries and have found through the centuries that they do quite well." Pet. App. 14a. That observation, however, is not helpful here. The essence of the materiality requirement is not a factual inquiry into what particular agency officials might do with accurate information. See *United States* v. *Hansen*, 772 F.2d 940, 950 (D.C. Cir. 1985) ("Application of § 1001 does not require judges to function as amateur sleuths, inquiring whether information specifically requested and unquestionably relevant to the department's or agency's charge would really be enough to alert a reasonably clever investigator that wrongdoing was afoot."), cert. denied, 475 U.S. 1045 (1986). Rather, materiality is determined by evaluating the relationship between the concealment or misrepresentation and the governmental process. See

---

[30] Examples include preliminary questions concerning the admissibility of evidence and the competency of witnesses, see Fed. R. Evid. 104; and, in criminal cases, the voluntariness of confessions and the legality of searches and seizures, see *Crane* v. *Kentucky*, 476 U.S. 683, 688-689 (1986) (circumstances of confession are relevant to the "purely legal question" of voluntariness as well as to ultimate factual question of guilt or innocence); *Jackson* v. *Denno*, 378 U.S. 368, 391 & n.19 (1964) (judge or separate jury may determine voluntariness of confession); 1 W. LaFave & J. Israel, *Criminal Procedure* § 10.5, at 801 (1984) ("The legality of a search is a matter of law to be determined by the court and not the jury, and this is so even when resolution of the matter depends upon a determination of the credibility of various witnesses.") (footnote omitted); see also Fed. R. Crim. P. 12(b)(3).

ibid.; see also *United States* v. *Staniforth*, 971 F.2d 1355, 1358 (7th Cir. 1992). That evaluation is akin to determining the relevance of evidence, a legal determination that throughout history has been assigned to the court. *Sinclair*, 279 U.S. at 298.

2. The judgment that materiality presents a legal question is not simply an ancient maxim that has survived for want of reexamination. Rather, it was specifically reaffirmed by this Court in *Kungys*, which held that the issue of materiality presented "an issue of law, which we may decide for ourselves" without initial resolution by the trial court as finder of fact. 485 U.S. at 772. The court of appeals found *Kungys* inapposite because it concerned a civil proceeding (denaturalization) rather than a criminal proceeding. That distinction led the court to doubt that this Court in *Kungys* considered the "constitutional implications" of its decision for criminal cases. Pet. App. 10a, 14a. *Kungys* is highly germane to the present case, however. As Judge Kozinski explained, the classification of materiality as a question of law or a question of fact does not differ depending on whether the classification is made in a civil proceeding or a criminal one:

> Something is either a question of law or a question of fact; it can't be both. Once it is held to be a question of law—as materiality was in *Kungys*—certain consequences follow. One is that the standard of review is de novo rather than for substantial evidence. Another is that, in a criminal case, it need not be decided by a jury.

Id. at 28a-29a (dissenting opinion). That analysis underscores the relevance of *Kungys* here. *Kungys*

relied heavily on criminal cases, including those decided under Section 1001, in construing the cognate materiality requirement under the denaturalization statute. Accordingly, the Court's conclusion that materiality raises an issue of law lays to rest any suggestion that materiality under Section 1001 raises the sort of factual issue that is required, as a matter of fundamental fairness, to be determined by the jury as trier of fact in a criminal case.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

RICHARD H. SEAMON
Assistant to the Solicitor General

KATHLEEN A. FELTON
Attorney

FEBRUARY 1995

☆ U. S. GOVERNMENT PRINTING OFFICE: 1995 387147 20041

Supreme Court, U.S.
FILED
MAR 28 1995
OFFICE OF THE CLERK

No. 94-514

In The

Supreme Court of the United States

October Term, 1994

UNITED STATES OF AMERICA,

Petitioner,

v.

MICHAEL E. GAUDIN,

Respondent.

On Writ Of Certiorari
To The United States Court Of
Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT

RICHARD HANSEN
DAVID ALLEN
TODD MAYBROWN
Counsel for Respondent

ALLEN, HANSEN & MAYBROWN
1001 Fourth Ave., #4301
Seattle, Washington 98154
(206) 447-9681

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

RECEIVED
APR -4 1995
OFFICE OF THE CLERK
SUPREME COURT, U.S.

BEST AVAILABLE COPY

COUNTER-STATEMENT OF QUESTION PRESENTED

Whether conflicting evidence concerning the alleged materiality of false statements in a prosecution under 18 U.S.C. § 1001 must be resolved by the jury where materiality is an essential element of the offense.

TABLE OF CONTENTS

Page

COUNTER-STATEMENT OF QUESTION PRESENTED .. i

TABLE OF AUTHORITIES iv

STATEMENT 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THE ISSUE OF MATERIALITY PRESENTS A "FACT-BOUND" INQUIRY 5

A. Securities Fraud 8

(1) 15 U.S.C. § 77q(a) 8

(2) Civil and Criminal Violations of the Securities and Exchange Act 10

B. Mail Fraud, Wire Fraud, and Bank Fraud 15

C. Material Misstatements or Omissions in Insurance Applications 19

II. BOTH STATE AND FEDERAL COURTS HAVE QUESTIONED, AND IN SOME CASES DISAVOWED, THE ANTIQUATED DICTUM OF SINCLAIR 21

III. CONSTITUTIONAL LIMITATIONS 27

A. The Requirements of Due Process 27

TABLE OF CONTENTS – Continued

Page

B. The Sixth Amendment Right to a Jury Trial... 30

C. The Significance of the Determination that Materiality is an Element of the False Statement Statute 34

IV. PRECEDENT AND HISTORY DO NOT JUSTIFY AN EXCEPTION TO THE HISTORIC ROLE OF THE JURY IN DECIDING ALL ELEMENTS OF A CRIMINAL CHARGE BEYOND A REASONABLE DOUBT 39

A. The Extent of Due Process Protections, and of the Sixth Amendment Right to a Jury Trial Have Evolved Substantially Since this Court's Decision in Sinclair 43

B. None of the Other Circuit Court of Appeals Decisions Seriously Considered the Constitutional Implications of Allowing the Court to Decide Materiality 47

V. CONCLUSION 49

TABLE OF AUTHORITIES

Page

CASES

Affiliated Ute Citizens v. United States, 406 U.S. 128 (1988) 10, 13

Angelastro v. Prudential-Bache Securities, Inc., 764 F.2d 939 (3rd Cir.), *cert. denied*, 474 U.S. 935 (1985) 13

Basic Incorporated v. Levinson, 485 U.S. 224 (1988) 13

Baumgartner v. United States, 322 U.S. 665 (1944) 35

Blockburger v. United States, 284 U.S. 299 (1932) 36

Bloom v. Illinois, 391 U.S. 194 (1968) 45, 47

Burch v. Louisiana, 441 U.S. 130 (1979) 47

Cage v. Louisiana, 498 U.S. 39 (1990) 31

Carella v. California, 491 U.S. 263 (1989) .. 4, 30, 31, 47

Chapman v. California, 386 U.S. 18 (1967) 32, 33

Chiarella v. United States, 445 U.S. 222 (1980) 3, 11

Codispoti v. Pennsylvania, 418 U.S. 506 (1974) 47

Commonwealth v. McDuffee, 398 N.E.2d 463 (1979) 26

Coy v. Iowa, 487 U.S. 1012, 1017 (1988) 45

Daubert v. Dow Chemical Co., Inc., 113 S.Ct. 2786 (1993) 48

Davis v. Alaska, 415 U.S. 308 (1974) 48

Davis v. United States, 160 U.S. 469 (1895) 27

Dowling v. United States, 493 U.S. 342 (1990) 44

Duncan v. Louisiana, 391 U.S. 145 (1968) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Dzenits v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 494 F.2d 168 (10th Cir. 1974) 14

Francis v. Franklin, 471 U.S. 307 (1985) 29

Freidus v. United States, 223 F.2d 598 (D.C. Cir 1955) 35

Haas v. Integrity Mutual Insurance Company, 90 N.W.2d 146 (Wis. 1958) 20

Henderson v. United States, 202 F.2d 400 (6th Cir.) 18

Herman & MacLean v. Huddleston, 459 U.S. 375 (1983) 3, 12

Honda Motor Co. v. Oberg, 114 S.Ct. 2331 (1994) .. 43, 44

Horning v. District of Columbia, 254 U.S. 135 (1920) ... 45, 46

Huddleston v. Herman & MacLean, 640 F.2d 534 (5th Cir. 1981), *aff'd.* in part, *rev'd.* in part on other grounds, 459 U.S. 375 (1983) 12

Interstate Commerce Commission v. Brimson, 154 U.S. 447 (1894) 45

Kungys v. United States, 485 U.S. 759 (1988) ..... *passim*

Lehigh Zinc & Iron Co. v. Bamford, 150 U.S. 665 (1893) 20

Leland v. Oregon, 343 U.S. 790 (1952) 39, 44

Luria v. United States, 231 U.S. 9 (1913) 24

M'Lanahan v. Universal Insurance Co., 26 U.S. 170 (1828) 19, 20

Marshall v. Metropolitan Life Insurance Company, 90 N.E.2d 194 (Ill. 1950) 20

TABLE OF AUTHORITIES – Continued

Page

Mayflower Insurance Exchange v. Gilmont, 280 F.2d 13 (9th Cir. 1960) 20

McMillan v. Pennsylvania, 477 U.S. 79 (1986) 36

Medina v. California, 112 S.Ct. 2572 (1992) 45

Metropolitan Life Insurance Company v. Becraft, 12 N.E.2d 952 (Ind. 1938) 20

Miller v. Fenton, 474 U.S. 104 (1985) 35

Missouri v. Hunter, 459 U.S. 359 (1983) 36

Morissette v. United States, 342 U.S. 246 (1952) ... 28, 30, 47

Mullaney v. Wilbur, 421 U.S. 684 (1975) 27, 28, 39

Nielsen v. Mutual Service Casualty Company, 67 N.W.2d 457 (Minn. 1954) 20

Paritem Singh Poonian v. United States, 294 F.2d 74 (9th Cir. 1961) 35

Patterson v. New York, 432 U.S. 197 (1977) ..... *passim*

Pence v. United States, 316 U.S. 332 (1941) 20

Pennsylvania v. Ritchie, 480 U.S. 39 (1987) 48

People v. Hedgecock, 795 P.2d 1260 (Cal. 1990) 24, 25

In Re Phillips Petroleum Securities Litigation, 881 F.2d 1236 (3rd Cir. 1989) 13

Pullman-Standard v. Swint, 456 U.S. 273 (1982) 35

Raab v. General Physics Corp., 4 F.3d 286 (4th Cir. 1993) 13

Rock v. Arkansas, 483 U.S. 44 (1987) 48

Rose v. Clark, 478 U.S. 570 (1986) 29

TABLE OF AUTHORITIES – Continued

Page

Sandstrom v. Montana, 442 U.S. 510 (1979) ..... *passim*

Santa Fe Industries v. Green, 430 U.S. 462 (1977)..13, 14

Schad v. Arizona, 111 S.Ct. 2491 (1991) 36, 39, 44

Sinclair v. United States, 279 U.S. 263 (1929) ..... *passim*

Smith v. John Hancock Mutual Life Insurance Company, 249 F.2d 657 (5th Cir. 1957) 20

Snyder v. Massachusetts, 291 U.S. 97 (1934)..... 44

Speiser v. Randall, 357 U.S. 513 (1958)..... 44

State v. Anderson, 603 A.2d 928 (N.J. 1992).....23, 24

Sullivan v. Louisiana, 113 S.Ct. 2078 (1993).....4, 31

TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438 (1976).....3, 13, 14

Ulster County Court v. Allen, 442 U.S. 140 (1979)..... 28

United Mine Workers v. Bagwell, 114 S.Ct. 2552 (1994).....47, 49

United States v. Abadi, 706 F.2d 178 (6th Cir.) *cert. denied*, 464 U.S. 821 (1983) 6, 7, 37, 48

United States v. Allen, 554 F.2d 398 (10th Cir. 1977), *cert. denied*, 434 U.S. 836 (1977) 18

United States v. Arch Trading Co., 987 F.2d 1087 (4th Cir. 1993) 7

United States v. Argentine, 814 F.2d 783 (1st Cir. 1987)..... 16

United States v. Bass, 784 F.2d 1282 (5th Cir. 1986) 17

United States v. Bessesen, 433 F.2d 861 (8th Cir. 1970), *cert. denied*, 401 U.S. 1009 (1971)..... 10

TABLE OF AUTHORITIES – Continued

Page

United States v. Brown, 555 F.2d 336 (2nd Cir. 1977) 8

United States v. Brown, 578 F.2d 1280 (9th Cir.), *cert. denied*, 439 U.S. 928 (1978) 10

United States v. Carpenter, 791 F.2d 1024 (2nd Cir. 1986), *aff'd.*, 484 U.S. 19 (1987)..... 9

United States v. Carroll, 582 F.2d 942 (5th Cir. 1978) ..9, 12

United States v. Charnay, 537 F.2d 341 (9th Cir. 1976), *cert. denied*, 429 U.S. 1000 (1976)..... 10

United States v. Cloud, 872 F.2d 846 (9th Cir. 1989) ...15, 16

United States v. Collatos, 798 F.2d 18 (1st Cir. 1986) 21

United States v. Corbin, 590 F.2d 398 (1st Cir. 1979) 8

United States v. Corr, 543 F.2d 1042 (2nd Cir. 1976) 14

United States. v. Corsino, 812 F.2d 26 (1st Cir. 1987) ..6, 35

United States v. Daily, 921 F.2d 994 (10th Cir. 1990), *cert. denied*, 112 S.Ct. 405 (1991).....7, 48

United States v. De Castirs, 798 F.2d 261 (7th Cir. 1986)..... 18

United States v. Dixon, 113 S.Ct. 2849 (1993) 36

United States v. Farris, 614 F.2d 634 (9th Cir. 1979), *cert. denied*, 447 U.S. 926 (1980) 9

United States v. Felix, 112 S.Ct. 1377 (1992)..... 36

United States v. Gaudin, 28 F.3d 943 (9th Cir. 1994) (*en banc*) 3

United States v. Gelb, 700 F.2d 875 (2nd Cir.), *cert. denied*, 464 U.S. 853 (1983) 8

TABLE OF AUTHORITIES – Continued

Page

United States v. Goldblatt, 813 F.2d 619 (3rd Cir. 1987) 15

United States v. Greber, 760 F.2d 68 (3rd. Cir), *cert. denied*, 474 U.S. 988 (1985) 6

United States v. Gribben, 984 F.2d 47 (2d Cir. 1993) 6

United States v. Guariglia, 757 F. Supp. 259 (S.D.N.Y. 1991) 21

United States v. Halbert, 640 F.2d 1000 (9th Cir. 1981) 18

United States v. Hansen, 772 F.2d 940 (D.C.Cir. 1985), *cert. denied*, 475 U.S. 1045 (1986) 7

United States v. Hausmann, 711 F.2d 615 (5th Cir. 1983) 7

United States v. Holzer, 816 F.2d 304 (7th Cir. 1987) 16

United States v. Jensen, 608 F.2d 1349 (10th Cir. 1979) 9

United States v. Johnson, 718 F.2d 1317 (5th Cir. 1983) 9, 17, 21

United States v. Johnson, 937 F.2d 392 (8th Cir. 1991) 7

United States v. Koonce, 485 U.S. 374 (8th Cir. 1973) 6

United States v. Koss, 506 F.2d 1103 (2nd Cir. 1974), *cert. denied*, 420 U.S. 977 (1975) 10

United States v. Lemmons, 941 F.2d 309 (5th Cir.), *rehearing denied*, 948 F.2d 1287 (1991) 15

United States v. Lichenstein, 610 F.2d 1272 (5th Cir.), *cert. denied*, 447 U.S. 907 (1980) 6, 35, 37

TABLE OF AUTHORITIES – Continued

Page

United States v. Lopez, 728 F.2d 1359 (11th Cir.) *cert. denied*, 469 U.S. 828 (1984) 7

United States v. Lovasco, 431 U.S. 783 (1977)..... 44

United States v. Martel, 792 F.2d 630 (7th Cir. 1986) 7

United States v. Mayo, 646 F.2d 369 (9th Cir. 1981), *cert. denied*, 454 U.S. 1127 (1981) 9

United States v. Medeles, 916 F.2d 195 (5th Cir. 1990) 15

United States v. Mentz, 840 F.2d 315 (6th Cir. 1988) 37

United States v. Newman, 664 F.2d 12 (2nd Cir. 1981) 10

United States v. O'Malley, 707 F.2d 1240 (11th Cir. 1983)..... 18

United States v. Persky, 520 F.2d 283 (2nd Cir. 1975).....11, 13, 37

United States v. Rodgers, 466 U.S. 475 (1984).....36, 37

United States v. Rubin, 836 F.2d 1095 (8th Cir. 1988) 9

United States v. Silvano, 812 F.2d 754 (1st Cir. 1987) 8

United States v. Staniforth, 971 F.2d 1355 (7th Cir. 1992)..... 21

United States v. Starr, 816 F.2d 94 (2nd Cir. 1987) 8

United States v. Stirling, 571 F.2d 708 (2nd Cir.), *cert. denied*, 439 U.S. 824 (1978) 9

United States v. Swearingen, 858 F.2d 1555 (11th Cir. 1988), *cert. denied*, 109 S.Ct. 1540 (1989) 15

United States v. Taylor, 693 F. Supp. 828 (N.D. Cal. 1988).....24, 25, 27

TABLE OF AUTHORITIES – Continued

Page

United States v. United States Gypsum Company, 438 U.S. 422 (1978) 28, 47

United States v. Vasilios, 598 F.2d 387 (5th Cir.), *cert. denied*, 444 U.S. 932 (1979) 9

United States v. Von Barta, 635 F.2d 999 (2nd Cir. 1980), cert. denied, 450 U.S. 998 (1981) 8

United States v. Von Dyke, 605 F.2d 220 (6th Cir.), *cert. denied*, 444 U.S. 994 (1979) 18

United States v. Walus, 616 F.2d 283 (7th Cir. 1980) 24

United States v. Whitehorse, 807 F.2d 1426 (8th Cir. 1986) 38

Williams v. Florida, 399 U.S. 78 (1970) 41, 42, 43

In Re Winship, 397 U.S. 358 (1970) ..... *passim*

Yates v. Aiken, 484 U.S. 211 (1988) 29

Yates v. Evatt, 111 S.Ct. 1884 (1991) 28, 32, 33, 34

CONSTITUTION, STATUTES AND RULES

U.S. Constitution

Fifth Amendment 31, 48

Sixth Amendment ..... *passim*

8 U.S.C. § 1451(a) 24

12 U.S.C. § 1709-2 1

15 U.S.C. § 77q(a) 3, 8, 9

15 U.S.C. § 78j(b) 3, 10, 12

18 U.S.C. § 1001 ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

18 U.S.C. § 1014 21

18 U.S.C. § 1341 ..... 3, 17

18 U.S.C. § 1343 ..... 3, 16, 17

18 U.S.C. § 1344 ..... 3, 15, 17

18 U.S.C. § 2314 ..... 10, 17

17 C.F.R. § 240.10b 3, 10, 11

Fed. R. Evid. 106 48

MISCELLANEOUS

Annotation, *False Statement by Insurance Applicant*, 66 A.L.R.3d 749 (1975) 21

Annotation, *Materiality of False Statements by Applicant for Automobile Insurance as to License Revocations or Suspensions or Traffic Violations*, 89 A.L.R.2d 1028 20

4 W.P. Blackstone, *Commentaries* * 350 40

2 Devitt, Blackmar & O'Malley, *Federal Jury Practice and Instructions* § 40.13 (4th ed. 1990) 3, 8, 11, 15, 18, 21

W. Forsyth, *History of Trial by Jury*, 235 (Morgan Ed. 1875) 41

Sand, *Modern Federal Jury Instructions*, ¶ 48.02, pp. 48-13 -48-14 21

STATEMENT

Respondent Gaudin was a real estate developer who purchased rental housing, renovated it, and sold it to buyers who utilized loans insured by the Federal Housing Administration (FHA), an entity within the Department of Housing and Urban Development (HUD), to finance the sales. Pet. App. 52a-53a. When the mortgage company discovered that Gaudin had numerous outstanding loans, it terminated all of his financing and forced him into default on 29 of the properties. He continued to collect rents and applied the proceeds to make payments on as many mortgages as he could, for taxes and capital improvements on other HUD financed houses. Pet. App. 54a-57a.

Gaudin was charged in Counts 2-17 and 19-42 with making material false statements on HUD-1 settlement forms in connection with the mortgages. The HUD-1 settlement form is typical of those used in real estate closings, and it contains a box for an entry of the amount due either "to" or "from" the borrower on line 303 of the form. The false statement charges in counts 2-17 and 19-42 were based upon the fact that respondent Gaudin, and not the buyer, either paid or received the indicated cash balances on line 303, although the amounts involved were fairly small, ranging from $31 to several thousand dollars. Counts 44-46 of the Indictment charged additional false statement violations based on allegedly inflated appraisals used to obtain financing for some of the subject properties. Pet. App. 3a-5a. Count 1, charging equity skimming in violation of 12 U.S.C. § 1709-2, was affirmed below, and is no longer at issue. Pet. App. 22a.

There was a genuine factual dispute at trial regarding the significance to FHA of the identity of the person paying or receiving the balance on line 303, and two counts (18 and 43) were dismissed for insufficient evidence. Pet. App. 53a. The Ninth Circuit noted in its decision that "[i]t appears quite doubtful from the format of the form and the certification on the form that it was designed to ferret out situations where the buyer might be serving as a stand-in for the seller or another person and did not intend to keep the house. . . . This surely

leads to a legitimate factual inquiry as to whether FHA officials pay any attention at all to line 303 of the HUD-1 form in their determination to insure the loan." Pet. App. 5a. Testimony was necessary at trial "to show that the block checked on line 303 was of any significance. Testimony was, indeed, taken from FHA officials to establish that factual contention." *Ibid.*

At the conclusion of the trial, the district court instructed the jury, as a separate element of the false statement charges under 18 U.S.C. § 1001, that the Government must prove "[t]hat the statement was material to the activities or decisions of the United States Department of Housing and Urban Development acting through the Federal Housing Administration." J.A. 22-23. However, the court removed this essential element from the jury's consideration by further instructing:

> With reference to the sixth element, I instruct you that the making of a false statement to an agency of the United States Government is not an offense unless the statement made is a material statement. The issue materiality, however, is not submitted to you for your decision but rather is a matter for the decision of the court. You are instructed that the statements charged in the indictment are material statements.

J.A. 24, 29.

On appeal, a panel of the Ninth Circuit reversed defendant's false statement convictions, holding that materiality is an essential element of false statement prosecutions under 18 U.S.C. § 1001, and it must therefore be decided by the jury. Pet. App. 57a-58a. The Government's Petition for Rehearing En Banc was granted, and the Ninth Circuit reaffirmed its holding that materiality under the false statement statute is an issue that must be decided by the jury because it is an essential element included within the definition of the offense. Pet. App. 10a-12a. The court reasoned: "We frequently submit far more complex questions to juries and have found through the centuries that they do quite well. The Sixth Amendment reflects a conscious judgment of the Framers to

interpose a jury between the judge and the accused to determine the facts necessary to find the accused guilty." Pet. App. 14a. The court also determined that "such an error cannot be harmless." Pet. App. 19a.

SUMMARY OF ARGUMENT

The Government's primary argument – that materiality is a question of law, and judges decide questions of law, ergo judges must decide materiality – is a simplistic syllogism that suffers from a defective major premise, for the record in this and similar cases demonstrates that "materiality" is essentially a "fact-bound" inquiry, well within the ability of jurors to decide the issue, as the Ninth Circuit observed in its opinion below. *United States v. Gaudin*, 28 F.3d 943, 950 (9th Cir. 1994) (*en banc*); Pet. App. 17a.

The issue of "materiality" turns on whether a false statement "was predictably capable of affecting, *i.e.*, had a natural tendency to affect, the official decision." *Kungys v. United States*, 485 U.S. 759, 771 (1988). In other contexts indistinguishable from false statement prosecutions, the issue of materiality is decided by the jury based on well established instructions that a statement is "material" if it "would be of importance to a reasonable person in making a decision about a particular matter or transaction." 2 E. Devitt, C. Blackmar & K. O'Malley, *Federal Jury Practice and Instructions* § 40.13 (4th ed. 1990) (hereinafter "Devitt, Blackmar & O'Malley"). This Court and numerous others have required the jury to decide the issue of materiality under similar civil and criminal statutes, such as mail fraud (18 U.S.C. § 1341), wire fraud (18 U.S.C. § 1343), bank fraud (18 U.S.C. § 1344), and the various securities fraud statutes (15 U.S.C. §§ 77q(a), 78j(b) and 17 C.F.R. § 240.10b-5). *Chiarella v. United States*, 445 U.S. 222, 236 (1980); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983); *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449-453 (1976). There is no rational reason to treat the issue differently for purposes of the false statement statute.

Further, the Due Process Clause and Sixth Amendment both require that the issue of materiality be decided by the jury, based on proof beyond a reasonable doubt. The Government concedes, as it must, that materiality is an essential element of the false statement statute, 18 U.S.C. § 1001, but argues it "is no different from other legal issues – for example, the admissibility of evidence – that are entrusted to the court and often require the assessment of facts." Government's Brief at 10-11.

However, the Government's attempt to equate threshold legal questions concerning the admissibility of evidence with proof of an essential element of a criminal charge violates the due process mandate of *In Re Winship*, 397 U.S. 358, 364 (1970), that the jury in criminal cases must be satisfied by "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the defendant] is charged."

This Court has often made clear that the removal of any element of a criminal charge from the jury's consideration violates not only the *Winship* due process mandate, but also " 'invade[s] [the] fact-finding function' which in criminal cases the law assigns solely to the jury," *Carella v. California*, 491 U.S. 263, 268 (1989) (*per curiam)* (Scalia, J., concurring). Such an error creates "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards". *Sullivan v. Louisiana*, 113 S.Ct. 2078, 2083, (1993). The Government's argument disregards the constitutional difference between the respective roles of judge and jury, which has never allowed a trial judge to direct a verdict on any essential element of a criminal offense. *Carella*, 491 U.S. at 268 (Scalia, J. concurring) (citing *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-573 (1977)).

Thus, where Congress has designated materiality as an essential element of a criminal charge – as it clearly has with the false statement statute, 18 U.S.C. § 1001 – basic constitutional principles of the Due Process Clause and the Sixth Amendment "truth-finding task assigned solely to juries in criminal cases" require that the jury decide the issue. *Carella*, 491 U.S. at 265.

ARGUMENT

I. THE ISSUE OF MATERIALITY PRESENTS A "FACT-BOUND" INQUIRY

As the Ninth Circuit observed, there is nothing novel about allowing juries to decide whether a false statement was material:

> The case before us is an excellent illustration of why materiality under a section 1001 charge is a "fact-bound" inquiry. One cannot look at a particular law or a particular statute or regulation to determine what would affect the decision of HUD to insure an FHA loan. False statements of age, address, gaps in employment history, or inaccuracies in a financial statement may be of no importance to some agency determinations but crucial to others.
>
> In Gaudin's case, the charges in Counts 2-17 and 19-42 involve merely checking a block on line 303 of a settlement statement that indicated that the borrower, rather than Gaudin, was paying or receiving the balance of the charges on settlement. Some of the amounts written on line 303 were trivial. For example: Count 11, $94.11; Count 12, $122.61; Count 13, $31.07; Count 28, $129.93; Count 31, $91.83. It was necessary to take testimony of department officials in order to determine whether the block checked on line 303 of the settlement statement would tend to influence the agency's decision to insure the loan.
>
> The jury is the finder of fact and is entitled to believe or disbelieve the testimony of the department officials. A persuasive factual argument could be made that there was a reasonable doubt as to whether the particular block checked on line 303 would have tended to influence the agency's decision.

28 F.3d at 950, Pet. App. 17a.

Even this Court's formulation of the test of materiality suggests it is a factual inquiry:

> The *Chaunt* formulation . . . does not necessarily facilitate judgment in the infinite variety of other factual patterns that may emerge. . . . We think it is safer in the naturalization context, as elsewhere, to fix as our guide the central object of the inquiry: whether the misrepresentation or concealment was predictably capable of affecting, *i.e.*, had a natural tendency to affect, the official decision.

Kungys v. United States, 485 U.S. at 771. Cf. *United States v. Abadi*, 706 F.2d 178, 180 (6th Cir.) *cert. denied*, 464 U.S. 821 (1983) ("the materiality of a statement rests upon a factual evidentiary showing") (quoted in *Kungys*, 485 U.S. at 772); *United States v. Koonce*, 485 U.S. 374, 380 (8th Cir. 1973) ("the question of materiality is one of law for the courts to decide. The proper determination of the question, however, is essentially a factual matter . . . "); *United States v. Lichenstein*, 610 F.2d 1272, 1278 (5th Cir.), *cert. denied*, 447 U.S. 907 (1980) ("Materiality rests upon a factual evidentiary showing by the prosecution.").[1]

---

[1] The decisions of the other circuits holding that the judge should decide the issue of materiality under 18 U.S.C. § 1001 similarly involve factual decisions, easily within the ken of jurors to decide. See *United States. v. Corsino*, 812 F.2d 26, 31 (1st Cir. 1987) (forged signatures on audit list to verify receipt of HUD funds held to be material because "[t]he jury could find, as we have said, that the purpose of sending the signatures to HUD was to make that agency believe that those people had actually verified receipt of the benefits."); *United States v. Gribben*, 984 F.2d 47, 50-52 (2d Cir. 1993) (police lied to prosecutor and grand jury that suspect's gun was retrieved from waistband, not from a closed bag, held to be material because "if Gribben had reported from the start . . . that handgun had been retrieved from a bag and not from Calhoun's waistband, prosecutors may have decided not to pursue the case."); *United States v. Greber*, 760 F.2d 68, 70-73 (3rd. Cir), *cert. denied*, 474 U.S. 988 (1985) (Medicare "claim forms representing that the Holter-monitors had been operated for eight hours or more when in fact the devices had been used for a much shorter time" held to be material because "Medicare required at least eight

In other contexts, both civil and criminal, where a charge or claim requires proof of a material misstatement or omission, the jury routinely decides the issue of materiality along with every other element. There is simply no rational basis to distinguish the jury's role in deciding materiality under those statutes from precisely the same kinds of questions presented by prosecutions under 18 U.S.C. § 1001.

---

hours of operation to qualify for payment."); *United States v. Arch Trading Co.*, 987 F.2d 1087, 1090, 1095 (4th Cir. 1993) (back-dated documents and false statement that contract had been performed prior to embargo on trade with Iraq held to be material for purpose of obtaining license from United States Treasury Department necessary to recover $200,000.00.); *United States v. Hausmann*, 711 F.2d 615, 618 (5th Cir. 1983) (presentment of false receipts in order to obtain disaster relief loan held material because "disbursement was dependent on proof that purchases had in fact been made. Had Hausmann not presented the false receipts, he would have received no money."); *United States v. Abadi*, 706 F.2d at 180 (osteopathic physician convicted for "false statements to the Medicaid program by billing for spinal manipulations which he had not performed."); *United States v. Martel*, 792 F.2d 630, 633, 637 (7th Cir. 1986) (defense contractor convicted for "false billing statements and receiving money for labor that was 'not performed as stated.' "); *United States v. Johnson*, 937 F.2d 392, 396-397 (8th Cir. 1991) (Air Force contract bid to replace damaged windows held *not* to be materially inflated when neither bidder nor Air Force knew exactly how many of the damaged windows could be reused); *United States v. Daily*, 921 F.2d 994, 997, 1004-1006 (10th Cir. 1990), *cert. denied*, 112 S.Ct. 405 (1991) (false statements regarding assets and debts on loan applications); *United States v. Lopez*, 728 F.2d 1359, 1362 n.4 (11th Cir.) *cert. denied*, 469 U.S. 828 (1984) (immigration attorney knowingly falsified "priority dates" for clients on residency applications to accelerate rulings by INS); *United States v. Hansen*, 772 F.2d 940, 949-951 (D.C.Cir. 1985), *cert. denied*, 475 U.S. 1045 (1986) (failure of Congressman to disclose loans and commodities profits on forms as required by the Ethics in Government Act of 1978 which would have – and ultimately did – prompt an investigation that concluded "the transactions violated House rules.").

A. Securities Fraud

(1) 15 U.S.C. § 77q(a)

The crime of securities fraud requires proof, among other elements, that the defendant "obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 15 U.S.C. § 77q(a)(2). Accordingly, the issue of materiality under this section of the statute is a specific element of the crime that must be decided by the jury. *See* 2 Devitt, Blackmar & O'Malley, § 52.03.[2]

The pattern jury instruction defining materiality for purposes of securities fraud reads as follows:

> If you should decide that a particular statement or a particular omission was false or misleading at the time that it was made, then you must determine if the fact stated or omitted was a "material" fact or a "material" omission under the evidence received in this case.
>
> In order for you to find a "material" fact or a "material" omission, the Government must prove beyond a reasonable doubt that the fact misstated or the fact omitted was of such importance that it could reasonably be expected to cause or to induce a person to act [to invest] or to cause or to induce a person not to act [not to invest].
>
> The securities fraud statute under which Count ___ of the indictment is brought is concerned only

---

[2] As with the false statement statute, proof of securities fraud does not require actual reliance or resulting injury or loss to anyone. *United States v. Brown*, 555 F.2d 336, 338 (2nd Cir. 1977). *See also United States v. Silvano*, 812 F.2d 754, 760 (1st Cir. 1987); *United States v. Corbin*, 590 F.2d 398, 402 (1st Cir. 1979) (actual injury need not be proven); *United States v. Starr*, 816 F.2d 94, 98 (2nd Cir. 1987); *United States v. Gelb*, 700 F.2d 875, 880 (2nd Cir.), *cert. denied*, 464 U.S. 853 (1983); *United States v. Von Barta*, 635 F.2d 999, 1006, n.14 (2nd Cir. 1980), *cert. denied*, 450 U.S. 998 (1981).

> with such "material" misstatements or such "material" omissions and does not cover minor, or meaningless, or unimportant ones.

Id., § 52.14.

Examples of material misrepresentations, all of which present a question for the jury in securities fraud prosecutions, are conceptually and analytically indistinguishable from those at issue in this case. They include the creation of fictitious land purchase agreements (similar to the "straw-buyers" in this case) and concealment of purchaser defaults in *United States v. Farris*, 614 F.2d 634, 637 (9th Cir. 1979), *cert. denied*, 447 U.S. 926 (1980); the failure to notify investors when a change in the nature of the investment enhanced the risk of loss in *United States v. Jensen*, 608 F.2d 1349, 1354 (10th Cir. 1979); false and misleading fiscal data on a corporate financial statement in *United States v. Vasilios*, 598 F.2d 387, 392 (5th Cir.), *cert. denied*, 444 U.S. 932 (1979); concealing the names of the true majority stockholders and misrepresenting the actual uses of proceeds of the sale of stock in *United States v. Carroll*, 582 F.2d 942, 946 (5th Cir. 1978); inflating reported earnings coupled with the concealment of adverse financial information in *United States v. Stirling*, 571 F.2d 708, 714 (2nd Cir.), *cert. denied*, 439 U.S. 824 (1978); *United States v. Rubin*, 836 F.2d 1095, 1103 (8th Cir. 1988); and *United States v. Mayo*, 646 F.2d 369, 371 (9th Cir. 1981), *cert. denied*, 454 U.S. 1127 (1981).

In *United States v. Jensen*, 608 F.2d at 1353, the court reasoned that criminal securities fraud violations under 15 U.S.C. § 77q(a)(2) required the government to prove "any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading", and found this to be "a fact question" which had appropriately been decided by the jury. *Accord: United States v. Carpenter*, 791 F.2d 1024, 1031-1032 (2nd Cir. 1986), *aff'd.*, 484 U.S. 19 (1987) (misappropriating "material non public information" from *Wall Street Journal*); *United States v. Johnson*, 718 F.2d 1317 (5th Cir. 1983) (*en banc*) (question whether a gold certificate was a "security" in prosecution

under 18 U.S.C. § 2314 must be decided by jury); *United States v. Koss*, 506 F.2d 1103 (2nd Cir. 1974), *cert. denied*, 420 U.S. 977 (1975) (failure to disclose material information); *United States v. Bessesen*, 433 F.2d 861, 864 (8th Cir. 1970), *cert. denied*, 401 U.S. 1009 (1971) (jury could find a "misleading concealment of a material fact" from failure to advise prospective purchasers of earlier cease and desist order); *United States v. Charnay*, 537 F.2d 341, 351 (9th Cir. 1976), *cert. denied*, 429 U.S. 1000 (1976) ("Failure to disclose that market prices are being artificially depressed operates as a deceit on the market place and is an omission of a material fact."); *United States v. Brown*, 578 F.2d 1280, 1283-1284 (9th Cir.), *cert. denied*, 439 U.S. 928 (1978) (statute requires "untrue statements of material facts or the omission to state material facts, the omission of which makes statements made misleading").

(2) Civil and Criminal Violations of the Securities and Exchange Act.

The Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5 (Rule 10b-5),[3] similarly contains a requirement of materiality with regard to both "untrue statements" and the omission of "a material fact necessary in order to make the statements made, in light of the circumstances in which they were made, not misleading."[4]

---

[3] "Rule 10b-5 . . . declares that, in connection with the purchase or sale of any security, it shall be 'unlawful for any person, directly or indirectly,' (1) 'To employ any device, scheme, or artifice to defraud,' (2) 'To make any untrue statement of a material fact' or to omit to state a material fact so that the statements made 'in the light of the circumstances,' are misleading and (3) 'To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.' " *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151 (1988). *See* 17 C.F.R. § 240.10b-5.

[4] Both civil and criminal actions may be brought under the provisions of Rule 10b-5. *United States v. Newman*, 664 F.2d 12, 16 (2nd Cir. 1981).

17 C.F.R. § 240.10b-5(b). Accordingly, the issue of materiality is specifically included in the instructions to the jury for criminal prosecution under this statute. 2 Devitt, Blackmar & O'Malley § 52.07.[5]

In *Chiarella v. United States, supra,* a criminal case brought under § 10(b) and Rule 10b-5, "the jury was instructed that the petitioner employed a scheme to defraud if he 'did not disclose . . . material non-public information in connection with the purchases of the stock.' " *Id.* at 236. This Court concluded:

> The jury instructions demonstrated that petitioner was convicted merely because of his failure to disclose material, non-public information to sellers from whom he bought the stock of target corporations. The jury was not instructed on the nature or elements of a duty owed by petitioner to anyone other than the sellers.

Ibid.[6]

In *United States v. Persky,* 520 F.2d 283 (2nd Cir. 1975), a criminal prosecution under section 10(b) and Rule 10b-5, the Court rejected a vagueness challenge to the "general terms" of the statute and rule, finding that a "reasonable

---

[5] Related pattern jury instructions similarly require the jury to decide the issue of materiality under other provisions of securities laws. The phrase "any manipulative or deceptive device or contrivance," is defined in jury instructions as "the deliberate omission of a material fact with the knowledge that the omission makes the facts, as represented, false." 2 Devitt, Blackmar & O'Malley, § 52.09. The term "deception" is similarly defined as "to defraud by deliberately making an affirmative misstatement of a material fact." *Ibid.* The term "manipulative or deceptive device" is defined as "a deliberate affirmative misstatement of a material fact or a deliberate omission of a material fact." *Ibid.*

[6] The Court reversed Chiarella's conviction because the defendant, as an employee of a printing company where prospectuses for corporate takeovers were produced, had none of the duties of a broker, and "[w]hen an allegation of fraud is based upon non-disclosure, there can be no fraud absent a duty to speak." *Id.* at 235.

citizen" would have no difficulty interpreting terms such as "material fact" or "any omission to state a material fact":

> While it is true that the language of [the section] uses general terms, its provisions, while perhaps falling short of the standards of immutability followed by the laws of the Medes and the Persians, are definite enough according to the canons of Anglo-American law.
>
> Subjecting the words . . . to critical scrutiny, we find no fatal ambiguity or indefiniteness . . . No honest and reasonable citizen could have difficulty in understanding the meaning of "untrue," "material fact," "any omission to state a material fact," "in light of the circumstances under which they were made," or "misleading." All these terms, it is true, call for interpretation in accordance to the facts of a given case.

Id., at 287 quoting *Coplin v. United States*, 88 F.2d 652, 657 (9th Cir.), *cert. denied*, 301 U.S. 703 (1937). In *United States v. Carroll*, 582 F.2d at 946, the material misstatements included misrepresentations of the identity of major stockholders, the court finding that "[i]t was not unreasonable for the jury to find the defendants guilty as charged . . . At least one investor testified that he purchased shares in the mining company in reliance on that representation." *Id.* at 946. In this case, the false statements similarly pertained to the identity of the person paying sometimes trivial amounts of closing costs.

In its civil applications, section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b), again requires the jury to find that the defendant misstated or omitted a "material fact." In *Herman & MacLean v. Huddleston, supra*, "the District Judge submitted the case to the jury on special interrogatories relating to liability" and "also instructed the jury to determine whether plaintiffs had proved their cause of action by a preponderance of the evidence." *Id.* at 378-379. Those interrogatories included the question "whether the prospectus was materially misleading and, if so, whether this was done with scienter of various defendants." *Huddleston v. Herman & MacLean*, 640 F.2d 534, 539 (5th Cir. 1981), aff'd.

in part, rev'd. in part on other grounds, 459 U.S. 375 (1983). According to the opinion of the Fifth Circuit Court of Appeals:

> The jury found that the prospectus was materially misleading as to the cost of constructing the speedway and that the defendants had "failed to disclose" the true facts with reckless disregard for the truth. The trial judge then himself determined the amount of damages . . .

640 F.2d 539-40 (footnote setting forth the jury's detailed findings omitted). *Accord: Angelastro v. Prudential-Bache Securities, Inc.*, 764 F.2d 939, 942-943 (3rd Cir.), *cert. denied*, 474 U.S. 935 (1985); *In Re Phillips Petroleum Securities Litigation*, 881 F.2d 1236, 1244 (3rd Cir. 1989).

As with this Court's definition of "materiality" in *Kungys*, the various formulations of deceit under the securities fraud statute encompass practices "that are intended to mislead investors." *Santa Fe Industries v. Green*, 430 U.S. 462, 476 (1977). *Accord: Basic Incorporated v. Levinson*, 485 U.S. 224, 239 (1988) ("[w]hether merger discussions in any particular case are material therefore depends on the facts", which must be weighed by the "factfinder"; thus, "materiality depends on the significance the reasonable investor would place on the withheld or misrepresented information."); *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. at 153-154 ("positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision. This obligation to disclose and this withholding of a material fact establish the requisite element of causation in fact." (Numerous citations omitted.)); *United States v. Persky*, 520 F.2d at 288; *Raab v. General Physics Corp.*, 4 F.3d 286, 289 (4th Cir. 1993) (" 'Soft,' 'puffing' statements such as these generally lack materiality because the market price of a share is not inflated by vague statements predicting growth.").

In *TSC Industries, Inc. v. Northway, Inc., supra*, the Court further clarified this test:

> The issue of materiality may be characterized as a mixed question of law and fact, involving as it does the application of a legal standard to a particular set of facts. . . . The determination requires delicate assessments of the inferences a "reasonable shareholder" would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact. Only if the established omissions are "so obviously important to an investor, that reasonable minds cannot differ on the question of materiality" is the ultimate issue of materiality appropriately resolved "as a matter of law" by summary judgment.

Id. at 450 (footnote and citations omitted). In a footnote accompanying the text quoted above, the Court analogized the jury's role in deciding materiality to "the jury's unique competence in applying the 'reasonable man' standard . . . in negligence cases." *Id.* at 450, n. 12 (citation omitted). After reviewing the evidence of materiality, the Court concluded: "These are questions we think best left to the trier of fact." *Id.* at 460.

And so it should be with 18 U.S.C. § 1001, a generic false statement statute with none of the complexities of securities trading. The determination of materiality in the fraud context often involves complex "practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity." *Santa Fe Industries, Inc. v. Green*, 430 U.S. at 476 (citations omitted). *Accord: Dzenits v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 494 F.2d 168 (10th Cir. 1974) ("churning"); *United States v. Corr*, 543 F.2d 1042, 1045-1046, nn. 4, 5, 6, 7 (2nd Cir. 1976) ("wooden tickets," "parking," "box in the stock," and "directed orders"). Thus, the determination of materiality in securities fraud cases is far more complex, and arguably presents a more technically difficult question than the typical false statement prosecution, yet it is routinely decided by the jury.

B. Mail Fraud, Wire Fraud, and Bank Fraud

In *United States v. Swearingen*, 858 F.2d 1555, 1556-1557 (11th Cir. 1988), *cert. denied*, 109 S.Ct. 1540 (1989), the Eleventh Circuit held that the Government must prove a "scheme by means of false pretenses, representations, and promises which were material" as an element of bank fraud prosecutions under 18 U.S.C. § 1344.[7] The pattern jury instruction defining "any scheme or artifice to defraud" makes repeated reference to "material" facts or omissions, and defines "[a] material fact" as "a fact that would be of importance to a reasonable person in making a decision about a particular matter or transaction." 2 E. Devitt, C. Blackmar & K. O'Malley, *Federal Jury Practice and Instructions* § 40.13 (4th ed. 1990).

In *United States v. Cloud*, 872 F.2d 846, 850 (9th Cir. 1989), the court required proof of "material, false statements or representations" as an element of bank fraud (citing *United States v. Goldblatt*, 813 F.2d 619, 624 (3rd Cir. 1987)).[8] In *Cloud*, as in this case, proof of a "material misrepresentation" on a closing statement was utilized to prove the offense. *Id.*, at 851. The court noted the importance of the bank's "reliance on false representations made by Cloud" because witnesses from the bank "testified that the escrow never would have closed, and that the Hibernia funds would not have been dispersed, if Cloud had objected to the misstated information or declined to sign the escrow instructions." *Id.*, at 852, n. 6.

---

[7] The bank fraud statute creates two offenses, the second of which requires "false or fraudulent pretenses, representations, or promises" to obtain monies, funds, credits, assets, securities or other property of or under control of the financial institution. *United States v. Medeles*, 916 F.2d 195, 198-199 (5th Cir. 1990). A financial institution need not actually suffer a loss, but need only be placed at risk. *United States v. Lemmons*, 941 F.2d 309, 312 (5th Cir.), *rehearing denied*, 948 F.2d 1287 (1991).

[8] In *Goldblatt*, the court instructed the jury that it must find "the scheme by means of false pretenses, representations and promises which were material," and also instructed that "a misrepresentation would be 'material' if it went to the heart of the refund transaction." 813 F.2d at 623.

Accordingly, the court found "[t]here was evidence before it from which the jury could infer that Cloud made a calculated decision to sign the instructions in order to obtain his share of the loan proceeds, knowing that the bank could be deceived by materially false statements that appeared on the face of the instructions." *Ibid.* Thus, the question of "materially false statements" in *Cloud* was factually and legally indistinguishable from the same question presented in this case where Gaudin allegedly made false statements on settlement statements to induce FHA loans.

In *United States v. Argentine*, 814 F.2d 783 (1st Cir. 1987), a wire fraud prosecution brought under 18 U.S.C. § 1343, the court reversed defendant's convictions because of the trial court's determination, as a matter of law, that his dealings were "fraudulent." The Court noted that "the evidence may not have been directly contradicted by conflicting evidence" but held:

> it is nonetheless settled, in a criminal case, that "[t]he plea of not guilty places every issue in doubt, and not even undisputed facts may be removed from the jury's consideration, either by direction or by omission in the charge." (Citations omitted.)
>
> * * *
>
> The Constitution casts judge and jury in mutually supporting – yet nevertheless distinct – roles. Undeniably inherent in the constitutional guarantee of trial by jury is the principle that a court may not step in and direct a finding of contested fact in favor of the prosecution "regardless of how overwhelmingly the evidence may point in that direction. The trial judge is . . . barred from attempting to override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 573 (1977).

Id. at 788. *Cf. United States v. Holzer*, 816 F.2d 304, 307 (7th Cir. 1987) (Posner, J.) ("Fraud in its elementary common law sense of deceit – and this is one of the meanings that fraud bears in the statute, *see United States v. Dial*, 757 F.2d 163,

168 (7th Cir. 1985) – includes the deliberate concealment of material information in a setting of fiduciary obligation"); *United States v. Bass*, 784 F.2d 1282, 1284-1285 (5th Cir. 1986) (reversible error in violation of *Winship* to instruct jury that defendant was "employee" in prosecution for submitting false or fraudulent W-4 forms, 26 U.S.C. § 7205).

Similarly, in *United States v. Johnson, supra*, the Fifth Circuit sitting *en banc* declined to extend the dictum of *Sinclair v. United States*, 279 U.S. 263 (1929), to a prosecution for interstate transportation of a falsely made securities in violation of 18 U.S.C. § 2314. The court reversed defendant's conviction because the trial judge had instructed the jury, as a matter of law, that gold certificates were securities, reasoning that "[t]he district judge was no more entitled to refuse to allow the jury to decide whether the Gold Certificate was a security than he would have been permitted to refuse to charge on whether the Certificate was falsely made or whether Johnson acted knowingly." *Id.* at 1323. Distinguishing *Sinclair*, the court discussed *Winship* and related cases (*id.*, at 1320-1324), concluding: "We are, therefore, reluctant to expand *Sinclair's* sweep at the expense of the accused's right to interpose the jury between himself and the judge." *Id.*, at 1324.

The standard instructions defining "false or fraudulent pretenses, representations, or promises" within the meaning of the three different criminal statutes for mail fraud, 18 U.S.C. § 1341, wire fraud, 18 U.S.C. § 1343, and bank fraud, 18 U.S.C. § 1344, all specifically require the jury, not the judge, to make the finding of materiality:

> The phrase "any scheme or artifice to defraud" means any deliberate plan of action or course of conduct by which someone intends to deceive or to cheat another or by which someone intends to deprive another of something of value.
>
> The term "false or fraudulent pretenses, representations, or promises" means a statement or an assertion which concerns a material or important fact or a material or important aspect of the matter in question and that was either known to be untrue at

> the time that it was made or used, or that was made or used with reckless indifference as to whether it was, in fact, true or false, and later used with intent to defraud. A material fact is a fact that would be of importance to a reasonable person in making a decision about a particular matter or transaction.

2 Devitt, Blackmar & O'Malley, § 40.13 (4th ed. 1990).

This jury instruction, and similar instructions requiring proof of "knowing concealment of material facts" are in common usage throughout the circuits. *See, e.g., United States v. Von Dyke*, 605 F.2d 220, 225 (6th Cir.), *cert. denied*, 444 U.S. 994 (1979); *Henderson v. United States*, 202 F.2d 400, 403 (6th Cir.), *rehearing denied*, 204 F.2d 126 (1953); *United States v. De Castirs*, 798 F.2d 261, 263 (7th Cir. 1986); *United States v. Halbert*, 640 F.2d 1000, 1007 (9th Cir. 1981); *United States v. Allen*, 554 F.2d 398, 410 (10th Cir. 1977), *cert. denied*, 434 U.S. 836 (1977); *United States v. O'Malley*, 707 F.2d 1240, 1247 (11th Cir. 1983).[9]

These cases all present questions of materiality at least as complex as those involved under the generic false statement statute, 18 U.S.C. § 1001, yet materiality is still a question for the jury under these various fraud provisions. Thus, the Government's arguments would force this Court to draw a meaningless distinction between generic, false statement

---

[9] Jury instructions for the Fifth, Eighth, and Eleventh Circuits all set forth similar definitions of materiality for the jury's determination. *See* Pattern Jury Instructions of the District Judge's Association of the Fifth Circuit, Instructions Nos. 2.54 and 2.55 (1990) ("A representation may be 'false' when it constitutes a half truth, or effectively conceals a material fact, provided it is made with intent to defraud."); Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, Instruction No. 6.18.1341 (1989) ("A material fact is a fact that would be important to a reasonable person in deciding whether to engage or not to engage in a particular transaction."); Pattern Jury Instructions of the District Judge's Association of the Eleventh Circuit, Instruction No. 34 (1985) ("A 'material fact' is a fact that would be of importance to a reasonable person in deciding whether to engage or not engage in a particular transaction.").

prosecutions under 18 U.S.C. § 1001, where the Government claims materiality is a question of law, and the materiality of false or fraudulent representations in securities regulation, wire, mail and bank fraud, where juries are routinely delegated the task of deciding the issue with no apparent difficulty.

C. Material Misstatements or Omissions in Insurance Applications.

The question of materiality in cases concerning recision of insurance coverage based on material misstatements or omissions has historically been reserved to the jury, both in England and in this country. In *M'Lanahan v. Universal Insurance Co.*, 26 U.S. 170 (1828) (Story, J.), the trial court had directed the jury to find that insurance coverage for a vessel that sank at sea was void based upon alleged, material misstatements in obtaining coverage. *Id.* at 182. The Court reversed, holding that the determination of what omissions or misstatements are material is exclusively for the jury:

> It is admitted, that a concealment, to be fatal to the insurance, must be of facts material to the risk; and, certainly, of this doctrine, there can not at this time be any legal doubt. It is further admitted (and so is the unequivocal language of the authorities), that generally, the materiality of the concealment is a question of fact for the jury.

Id. at 188. The Court noted that the English practice was the same, holding "that the operation of any concealment on the policy depends on its materiality to the risk, and that this materiality is a subject for the consideration of a jury." *Id.* at 191 (quoting *Maryland Insurance Company v. Ruden's Administrators*, 10 U.S. 338 (1810)).

The Court in *M'Lanahan* recognized that the "test of materiality . . . is, in many cases, an inquiry dependent upon the judgment of underwriters and others, who are conversant with the subject of insurance. . . . Upon such a point, it would not be a matter of surprise, if different underwriters should arrive at different results." *Id.* at 188-189. After discussing

both English and American cases relevant to the issue, the Court nevertheless concluded

> that the question of materiality of the time of the sailing of the ship to the risk, is a question for the jury, under the direction of the court, as in other cases. The court may aid the judgment of the jury, by an exposition of the nature, bearing, and pressure of the facts, but it has no right to supersede the exercise of that judgment, and to direct an absolute verdict as upon a contested matter of fact, resolving itself into a mere point of law.

26 U.S. at 191. Accordingly, the judgment was reversed. *Ibid.* *Accord*: *Pence v. United States*, 316 U.S. 332, 338 (1941) (elements of insurance fraud include "(1) a false representation (2) in reference to a material fact (3) made with knowledge of its falsity (4) and with intent to deceive (5) with action taken in reliance upon the representation,"); *Lehigh Zinc & Iron Co. v. Bamford*, 150 U.S. 665, 672-673 (1893) (Harlan, J.).

While there is a division of authorities, courts have generally followed this rule over the 165 years since the *M'Lanahan* case, reserving for juries the issue "whether knowledge of the concealed facts would reasonably have influenced the company in accepting the risk or fixing the premium." *Mayflower Insurance Exchange v. Gilmont*, 280 F.2d 13, 16-17 (9th Cir. 1960) (numerous citations omitted).[10]

---

[10] In that case, the court applied Oregon law, but relied upon numerous decisions from other jurisdictions in support of its holding that "[m]ateriality is a question of fact. It is a question for the jury when reasonable minds can differ as to its existence. *See, e.g., Haas v. Integrity Mutual Insurance Company*, 90 N.W.2d 146 (Wis. 1958); *Smith v. John Hancock Mutual Life Insurance Company*, 249 F.2d 657 (5th Cir. 1957); *Nielsen v. Mutual Service Casualty Company*, 67 N.W.2d 457 (Minn. 1954); *Marshall v. Metropolitan Life Insurance Company*, 90 N.E.2d 194 (Ill. 1950); *Metropolitan Life Insurance Company v. Becraft*, 12 N.E.2d 952 (Ind. 1938)." *Id.* at 17. *See also* Annotation, *Materiality of False Statements by Applicant for Automobile Insurance as to License Revocations or Suspensions or Traffic Violations*, 89 A.L.R.2d 1028 ("Ordinarily,

See Annotation, *False Statement by Insurance Applicant,* 66 A.L.R.3d 749, §§ 3-5 (1975).

II. BOTH STATE AND FEDERAL COURTS HAVE QUESTIONED, AND IN SOME CASES DISAVOWED, THE ANTIQUATED DICTUM OF SINCLAIR

Although the Government argues that the other circuits are unanimous in holding that the trial judge must decide the issue of materiality, some circuit courts of appeal have questioned this rule and several state courts have simply refused to follow it, despite the language from *Sinclair* and this Court's more recent dictum in *Kungys.*[11]

In *United States v. Staniforth,* 971 F.2d 1355, 1358 (7th Cir. 1992), a prosecution under 18 U.S.C. § 1014 for making false statements to a bank, Judge Posner questioned the anomaly inherent in the rule that "materiality," where an element of

---

the materiality of a representation as to license revocations or suspensions or traffic violations is a question for the trier of facts. . . . The test of materiality is whether knowledge of the truth would have reasonably influenced the insurer in accepting the risk or fixing the premium.").

[11] In *United States v. Collatos,* 798 F.2d 18, 19-20 (1st Cir. 1986) the First Circuit noted: "although courts might be reluctant to 'expand *Sinclair's* sweep at the expense of the accused's right to interpose the jury between himself and the judge,' [*United States v. Johnson,* 718 F.2d at 1324], in this case – which is squarely on point with *Sinclair* – we apply its mandate . . . ". In *United States v. Guariglia,* 757 F. Supp. 259, 266 (S.D.N.Y. 1991), a perjury prosecution, the court cited Sand, *Modern Federal Jury Instructions,* ¶ 48.02, pp. 48-13 – 48-14, for the proposition that "[t]he better practice is to give the question of materiality to the jury".

Devitt, Blackmar & O'Malley, the standard source of jury instructions in federal court, makes two references to *Sinclair* with the caveat that "it should be noted, however, that *Sinclair* did not involve a prosecution for perjury or false statements and the Court's discussion of materiality in this regard is dictum." 2 Devitt, Blackmar & O'Malley, §§ 43.03, 43.07. The commentary also warns that "the most recent decision should be consulted before removing an essential element of the offense charged – particularly a controverted one – from determination by the jury." *Id.*, § 43.03.

a criminal offense, "is a question of law to be decided by the judge":

> This is more than a little puzzling. A criminal defendant is entitled to require the prosecutor to prove to the jury's satisfaction every element of the offense, *Estelle v. McGuire*, 112 S.Ct. 475, 480 (1991); *Bates v. McCaughtry*, 934 F.2d 99, 102 (7th Cir. 1991), and materiality, we have just seen, is one of the elements in a prosecution under section 1014.

Id. Judge Posner saw a distinction between consideration of "materiality" in perjury cases, where it is related to relevancy, and in modern statutes making material false statements to government agencies or banks a criminal offense:

> The proposition that it is a question for the judge traces back to cases involving prosecutions for perjury, e.g., *Sinclair v. United States*, 279 U.S. 263, 298 (1929), where materiality refers to the legal *relevance* of the question to the trial or investigation in which the defendant answered the question falsely, while here it refers to the factual issue of whether the false statement could have influenced the bank in making a loan. The Supreme Court applied the perjury rule to a false-statement statute (18 U.S.C. § 1001) in *Kungys v. United States*, 485 U.S. 759, 772 (1988), on the authority of *Sinclair*, without remarking the difference between that context and the one in which the rule had been developed. See *Weinstock v. United States*, 231 F.2d 699, 702-703 (D.C. Cir. 1956)
>
> * * *
>
> Relevance is a legal determination. Juries are told what is relevant; they do not make determinations of relevance. But the question whether a false statement to a bank or other business firm is capable of influencing the firm's decisions is no more a question of law than whether a false statement to a prospective investor is capable of influencing his decision to invest and therefore is material to that decision. The distinction was overlooked in *United*

> *States v. Dailey,* 921 F.2d 994, 1004 (10th Cir. 1990), where the Tenth Circuit, which had distinguished cases based on *Sinclair* in *United States v. Irwin,* 654 F.2d 671, 677 n. 8 (10th Cir. 1981), held that *Kungys* constrained it to hold that materiality is a question of law in prosecutions under the federal false-statement statutes.

Id. (emphasis in original). However, since the issue was not before it, the court did "not attempt to resolve today the interesting issue of whether materiality in a prosecution under section 1014 is a question of fact or a question of law." *Id.*, at 1359.

Several state courts have gone further, concluding that the *Sinclair* dictum has been invalidated by *Winship* and other, more recent decisions of this Court. In *State v. Anderson,* 603 A.2d 928, 929 (N.J. 1992), the New Jersey Supreme Court observed that "[t]he few jurisdictions that have undertaken a fresh examination have concluded that the longstanding rule is fundamentally flawed, its foundation without footings." (Citations omitted) The court overruled its own precedent and disavowed *Sinclair,* because the historical view "declaring materiality to be a question of law irreconcilably conflicts with the constitutional right of an accused to have a jury determine the existence beyond a reasonable doubt of each essential element of a crime before he or she is convicted." *Id.* at 929 (citations omitted). The court reasoned that "[i]ntertwined with the right to a jury trial is the federal constitutional right to due process of law" (*id.* at 932), and concluded:

> Both the tenets of due process and the right to a jury trial mandate that here materiality, as an element of the offense of perjury, must be found beyond a reasonable doubt by the jury.

Id. at 933.

In so holding, the *Anderson* Court acknowledged this Court's dictum in *Kungys v. United States,* 485 U.S. at 772, but hesitated "to place conclusive weight behind the Court's statement in *Kungys.* We note that the statute at issue there

does not provide for a trial by jury, . . . " *Id.*[12] The court declined to follow *Kungys* "primarily because there was no occasion to address either the constitutional jury-right issue or the related due-process issue," and the court questioned whether the Supreme Court today would "find the rule of *Sinclair* reconcilable with its construction of the fundamental right to a trial by jury." *Id.* at 933.

The *Anderson* Court offered a cogent explanation for the erroneous historical view that materiality is subject to judicial determination, theorizing that courts have confused the concept of materiality "as an initial evidentiary determination" (as the Government argues in this case), with the situation where it is an element of a criminal offense. 603 A.2d at 933-935. In the latter context, juries are perfectly capable of making this kind of determination:

> While as lawyers we are accustomed to thinking of materiality as a matter for judicial ruling, there is nothing in the nature or quality of materiality which makes it essentially a legal concept or removes it from the ken of a layman's discernment and determination. The word "material" and the idea of materiality are commonly understood, and every day judgments on a variety of subjects are made upon the basis of a layman's sense of materiality.

Id. at 934 (quoting *People v. Clemente*, 136 N.Y.S.2d 202, 205 (1954)).

---

[12] *Kungys* involved a civil complaint brought pursuant to 8 U.S.C. § 1451(a) to denaturalize a citizen who had allegedly made misrepresentations of material facts when he applied for citizenship. Such proceedings are not criminal and do not invoke the Sixth Amendment right to a jury trial. *See Luria v. United States*, 231 U.S. 9, 27-28 (1913); *United States v. Walus*, 616 F.2d 283, 304 n. 53 (7th Cir. 1980).

This distinction was critical to the reasoning of *Anderson* and other courts that have declined to follow the dictum in *Sinclair* and *Kungys*. *See United States v. Taylor*, 693 F. Supp. 828, 839-841 (N.D. Cal. 1988); *People v. Hedgecock*, 795 P.2d 1260, 1266 (Cal. 1990).

The court in *United States v. Taylor,* 693 F. Supp. 828 (N.D. Cal. 1988), applied a similar analysis to explain the confusion that has resulted from blurring this distinction:

> A ruling by the court regarding evidence simply determines what information a jury may consider in reaching its decision regarding the elements of an offense; a ruling by the court regarding materiality precludes the jury from reaching a decision regarding that element. As the Supreme Judicial Court of Massachusetts found in *Commonwealth v. McDuffee,* 398 N.E.2d 463, 468 (1979), it is therefore questionable whether useful analogy can any longer be drawn between the determination of the relevance of evidence for purposes of admissibility and the determination of the element of materiality for purposes of perjury conviction.

693 F. Supp. at 839.

Similarly, the California Supreme Court held in *People v. Hedgecock,* 795 P.2d 1260 (Cal. 1990), that even though "in a perjury prosecution the accused historically has not been entitled to have the jury decide the question of materiality . . . 'the continuing validity of [this rule] may be doubtful in light of *In re Winship, supra*, and *Connecticut v. Johnson*, 460 U.S. 73 (1983).' " *Id.* at 1266 (quoting from *People v. Figueroa,* 715 P.2d 680 (1986)). The *Hedgecock* Court reasoned that

> the determination of materiality is not simply a question of law. Rather, it involves an evaluation of the significance of the defendant's statements or omissions, in the circumstances in which they were made. This is a task appropriately entrusted to the jury.

795 P.2d at 1267. While expressing "no view whether in perjury prosecutions based on false testimony at a judicial or legislative proceeding the question of materiality is a jury issue", the court nevertheless held "that in a perjury prosecution based on errors or omissions in disclosure statements required by the Act [the Political Reform Act of 1974, Gov. Code, § 81000 et seq.], materiality is an essential element of

the offense, and must therefore be determined by the jury." 795 P.2d 1267-1268.

In *Commonwealth v. McDuffee*, 398 N.E.2d 463 (Mass. 1979), the court reversed the defendant's conviction for perjury because the trial court instructed the jury "that the defendant's statements, contained in his application, were material as a matter of law." *Id.* a. 467. The court discussed the history of perjury prosecutions and concluded:

> Early English case law presents a split of opinion as to whether the issue of materiality should be treated as a question of law for the court's determination or a question of fact to be submitted to the jury. The controversy was set to rest in England by the Perjury Act of 1911 which provided in pertinent part, "(6) The question whether a statement on which perjury is assigned was material is a question of law to be determined by the court of trial." 1 & 2 Geo. 5, c. 6, § 1(6) (1911).

Ibid. (footnote and numerous citations omitted). The omitted footnote observed that "[t]he perjury statutes in this Commonwealth, G.L. c. 268, §§ 1-1A, contain no such provision." *Ibid.*, n. 9.

The court then discussed the history of *Sinclair* and the questionable validity of the cases cited in support of its holding, *Id.* at 468, and held:

> We see no justification for removing the issue from the jury in order to allow the trial judge to decide if there exists a sufficient connection between the purpose of the question and the object of the inquiry to warrant a finding of materiality.

Id. at 469. The court reasoned "[i]t is not beyond a layman's judgment whether the statements in question had a 'reasonable and natural tendency' to influence the pertinent determination." *Id.* at 470 (citation omitted).

Thus, the sheer weight of "precedent and history" that the Government relies upon has increasingly lost its momentum as a growing number of recent decisions re-examine the issue with more thoughtful analysis than the Circuit Court of

Appeals' decisions relied upon by the Government. *See* n. 1, *supra*.[13]

III. CONSTITUTIONAL LIMITATIONS

A. The Requirements of Due Process

The due process requirement that the prosecution bear the burden of "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the defendant] is charged" has a long history in this Court's decisions. *In Re Winship*, 397 U.S. at 364. "The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence – that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.' " *Winship*, 397 U.S. at 363, quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895). *See also Davis v. United States*, 160 U.S. 469, 493 (1895), holding the prosecution must prove, beyond a reasonable doubt, "the existence of every fact necessary to constitute the crime charged," quoted in *Winship*, 397 U.S. at 363.[14]

This basic, constitutional principle has often been reaffirmed and never questioned in subsequent decisions. In *Mullaney v. Wilbur*, 421 U.S. 684, 703 (1975), the Court invalidated a Maine law requiring "a defendant to establish by a preponderance of the evidence that he acted in the heat of passion on sudden provocation in order to reduce murder to manslaughter," as "an intolerable result," (citing *Winship*, 397 U.S. at 372 (Harlan, J., concurring)). As in this case with

---

[13] Almost none of the decisions of the other circuits even mention *Winship*, much less discuss it. *See* discussion *infra*, at pp. 47-49. As the court observed in *United States v. Taylor*, 693 F. Supp. at 831, "cases generally continue simply to cite *Sinclair* and its progeny without analysis."

[14] The Government acknowledges that the due process requirement of proof beyond a reasonable doubt "is a firmly rooted principle." Government Brief at 36, n. 25.

materiality, Maine's legislative decision to place this burden on the defense was the common law practice. 421 U.S. at 694 and n. 16. Thus, "as a formal matter the absence of the heat of passion on sudden provocation is not a 'fact necessary to constitute the *crime*' of felonious homicide in Maine." *Id.*, at 697, citing *Winship*, 397 U.S. at 364 (emphasis in original). The Court nevertheless found Maine's legislative act invalid under the Due Process Clause despite the fact that "negating an argument that the homicide was committed in the heat of passion" presents "a heavy burden for the prosecution to satisfy." *Id.*, at 701. *Accord: Patterson v. New York*, 432 U.S. 197, 215 (1977) ("*Mullaney* surely held that a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense."); *Yates v. Evatt*, 111 S.Ct. 1884 (1991).

In *Sandstrom v. Montana*, 442 U.S. 510 (1979), the Court reversed petitioner's murder conviction, holding that an instruction advising the jury that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts" violated the due process dictates of *Winship*. 442 U.S. at 513, 520-524. The Court relied upon its decisions in *Morissette v. United States*, 342 U.S. 246, 275 (1952), and *United States v. United States Gypsum Company*, 438 U.S. 422 (1978), to invalidate this presumption, because it "would 'conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime,' and would 'invade [the] factfinding function' which in a criminal case the law assigns solely to the jury." 442 U.S. at 523. The Court underscored this principle in *Ulster County Court v. Allen*, 442 U.S. 140 (1979):

> Nonetheless, in criminal cases, the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt.

442 U.S. at 156 (citing *Winship*, 397 U.S. at 364 and *Mullaney v. Wilbur*, 421 U.S. at 702-703, n.31.). *Accord*: *Francis v. Franklin*, 471 U.S. 307, 326 (1985) (presumption that "[t]he acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted" violates "the wellspring due process principle" of *Sandstrom v. Montana*, *supra*); *Yates v. Aiken*, 484 U.S. 211 (1988).

In *Rose v. Clark*, 478 U.S. 570 (1986), the Court found harmless error in jury instructions that violated the principles of *Sandstrom* and *Francis v. Franklin*, but distinguished the kind of situation presented here, where:

> harmless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury. We have stated that "a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict . . . regardless of how overwhelming the evidence may point in that direction."

Id., at 578 (citing *United States v. Martin Linen Supply Co.*, *supra*, 430 U.S. 564, 572-573 (1977), and *Carpenters v. United States*, 330 U.S. 395, 408 (1947)). "Where that right is altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty." *Id.* at 578.[15]

---

[15] In concluding that a *Sandstrom* error is not "equivalent to a directed verdict for the State," the Court explained in a footnote: "Because a presumption does not remove the issue of intent from the jury's consideration, it is distinguishable from other instructional errors that prevent a jury from considering an issue." *Id.* at 581 and n. 8, citing *Connecticut v. Johnson*, 460 U.S. 73, 95, n. 3 (1983) (Powell, J., dissenting).

This distinction would have no effect here, where the jury was never allowed to consider the issue of materiality because the trial judge – "the wrong entity" in the words of *Rose* – instructed the jury that "[t]he issue materiality, however, is not submitted to you for your decision but rather is a matter for the decision of the court. You are instructed that the statements

B. The Sixth Amendment Right to a Jury Trial.

This Court has often recognized the necessary interrelationship of the *Winship* requirement of "proof beyond a reasonable doubt," and the dictates of the Sixth Amendment that it is exclusively the role of the jury to apply this burden of proof in deciding every "fact necessary to constitute the crime with which [the defendant] is charged." *Winship,* 397 U.S. at 364. In *Morissette v. United States,* 342 U.S. at 274, the Court emphasized not only the due process presumption of innocence and burden of proof beyond a reasonable doubt, but also the essential Sixth Amendment requirement that intent, as "an ingredient of the crime charged" is "a question of fact which must be submitted to the jury." In *Sandstrom v. Montana, supra*, the Court held a presumption of intent violates both due process and also "would 'invade [the] factfinding function' which in a criminal case the law assigns solely to the jury." 438 U.S. at 523. *Accord*: *Carella v. California,* 491 U.S. at 265 (presumptions "subvert the presumption of innocence accorded to accused persons and also invade the truth-finding task assigned solely to juries in criminal cases").

In his concurring opinion in *Carella*, Justice Scalia emphasized the historical significance of the "structural guarantee" that a jury decide the facts of a criminal case without any involvement by the judge:

> The constitutional right to a jury trial embodies "a profound judgment about the way in which law should be enforced and justice administered." *Duncan v. Louisiana,* 391 U.S. 145, 155 (1968). It is a structural guarantee that "reflect[s] a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." *Id.,* at 156. A defendant may assuredly insist upon observance of the guarantee even when the evidence against him is so overwhelming as to

---

charged in the indictment are material statements." J.A. 24, 29 (Court's instructions to the jury).

> establish guilt beyond a reasonable doubt. That is why the Court has found it constitutionally impermissible for a judge to direct a verdict for the State.

491 U.S. at 268 (Scalia, J., concurring). Justice Scalia's concurrence noted the importance of the jury's involvement in resolving all factual questions, regardless of the weight of the evidence:

> In other words, "the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials." *Bollenbach v. United States,* 326 U.S. 607, 614 (1946). "Findings made by a judge cannot cure deficiencies in the jury's findings as to the guilt or innocence of a defendant resulting from the court's failure to instruct it to find an element of the crime." *Cabana v. Bullock,* 474 U.S. 376, 384-385 (1986).

Id. at 269 (Scalia, J., concurring).

In *Sullivan v. Louisiana, supra,* this Court unanimously reversed the petitioner's first degree murder conviction because of a defective reasonable doubt instruction, which had been held unconstitutional in *Cage v. Louisiana,* 498 U.S. 39 (1990) (*per curiam*).[16] The Court again recognized the interrelationship between the due process reasonable doubt requirement and the Sixth Amendment right to have a jury decide every fact necessary for conviction:

> It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. . . . In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.

Sullivan, 113 S.Ct. at 2081.

---

[16] In *Cage,* the defective instruction was held to violate the dictates of *In Re Winship, supra,* because it defined reasonable doubt as a "substantial" or "grave" doubt, which the Court held to "suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard." 498 U.S. at 41.

The importance of the Sixth Amendment right to a jury creates an analytical distinction between "trial errors," based on due process violations where harmless error analysis is applicable; and "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards" of *Chapman v. California,* 386 U.S. 18 (1967). *Sullivan,* 113 S.Ct. at 2082 (quoting *Arizona v. Fulminante,* 499 U.S. 279 (1991)). A defective reasonable doubt instruction creates a structural error that is not subject to harmless error analysis, because the Sixth Amendment right to have a jury resolve all issues of guilt is

> a "basic protectio[n]" whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function, *Rose v. Clark,* 478 U.S. 570, 577 (1986). The right to trial by jury reflects, as we have said, "a profound judgment about the way in which law should be enforced and justice administered." *Duncan v. Louisiana,* 391 U.S., at 155. The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as "structural error."

Sullivan, 113 S.Ct. at 2083.[17]

The holding in *Yates v. Evatt,* 111 S.Ct. 1884 (1991), a presumption case, is indicative of this Court's uncompromising view of the Sixth Amendment requirement that the jury pass judgment on all facts in a criminal case. There, the Court

---

[17] The Government asserts that the Ninth Circuit's recognition of a relationship between due process and the right to have a jury decide all elements of a crime "erroneously conflated the two requirements in an attempt to justify its refusal to follow *Sinclair* in light of the 'later pronouncements in *Winship* through *Sullivan.*' " Government's Brief at 37, citing Pet. App. 16a, 28 F.3d at 950.

Quite to the contrary, the Ninth Circuit opinion simply recognized the necessary connection between these two constitutional imperatives, a connection often recognized by this Court as dictated by the structural role of the jury in applying the burden of proof beyond a reasonable doubt to all facts necessary for conviction.

held that the South Carolina Supreme Court's application of the harmless error test of *Chapman v. California*, 386 U.S. 18 (1967), was erroneously based on the question whether "the verdict could have been the same without the presumptions, when there was evidence sufficient to support the verdict independently of the presumptions' effect." 111 S.Ct. at 1895. This approach "does not satisfy all of *Chapman's* concerns" because:

> [T]he enquiry will not tell us whether the jury's verdict did rest on that evidence as well as on the presumptions, or whether that evidence was of such compelling force as to show beyond a reasonable doubt that the presumptions must have made no difference in reaching the verdict obtained. Because the State Supreme Court's standard of review apparently did not take these latter two issues into consideration, reversal is required.

Ibid. It is significant to the issues presented in this case that the *Yates* analysis required the Court to take "two quite distinct steps," both of which hinged on "what evidence the jury actually considered" regarding the affected element of the offense. *Id.* at 1893.

The concurring opinion by Justice Scalia, joined by Justice Blackmun, emphasizes that the Court's analysis requires reversal unless the record proves that the jury actually did find all the elements of the offense beyond a reasonable doubt without reliance on an evidentiary presumption:

> Given the nature of the instruction here, then, to determine from the "entire record" that the error is "harmless" would be to answer a purely hypothetical question, viz., whether, if the jury *had been* instructed correctly, it *would have* found that the state proved the existence of malice beyond a reasonable doubt. Such a hypothetical inquiry is inconsistent with the harmless-error standard announced in *Chapman v. California*, 386 U.S. 18, 24 (1967) and reiterated by the Court today. "[T]he issue under *Chapman* is whether the jury *actually rested* its verdict on evidence establishing the presumed fact beyond a reasonable doubt, independently of

> the presumption." Ante, at 1893 (emphasis added). *See also Bollenbach v. United States*, 326 U.S. 607, 614 (1946) ("the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials"). While such a hypothetical inquiry ensures that the State has, in fact, proved malice beyond a reasonable doubt, it does not ensure that it has proved that element beyond a reasonable doubt *to the satisfaction of a jury.*

Id. at 1898 (emphasis in original). In this case, it is clear that the jury was directed to find the element of materiality without considering any of the relevant evidence:

> With reference to the sixth element, I instruct you that the making of a false statement to an agency of the United States Government is not an offense unless the statement made is a material statement. The issue materiality, however, is not submitted to you for your decision but rather is a matter for the decision of the court. You are instructed that the statements charged in the indictment are material statements.

J.A. 24, 29 (Court's instructions to the jury).

The holding of *Yates* underscores the singular importance of the jury determination of all facts in a criminal case, and would negate any possibility of finding harmless error on this record, where the trial court directed a verdict on the element of materiality, thus precluding the jury from considering any evidence in deciding the issue.

C. The Significance of the Determination that Materiality is an Element of the False Statement Statute.

Whenever an issue is an essential element of a criminal offense, constitutional principles of due process and the right to a jury trial must take precedence over the strained evidentiary distinction between issues of fact and law that form the

basis of all the Government's arguments for reversal in this case.[18]

Nearly all courts that have considered the issue have held "materiality" to be an essential element of each clause within the false statement statute, 18 U.S.C. § 1001. *See, e.g., United States v. Corsino,* 812 F.2d 26, 30 (1st Cir. 1987); *United States v. Lichenstein,* 610 F.2d at 1278; *Paritem Singh Poonian v. United States,* 294 F.2d 74, 75 (9th Cir. 1961); *Freidus v. United States,* 223 F.2d 598, 601 (D.C. Cir 1955). Accordingly, the Government concedes that the false statement statute has "long been interpreted to contain an implicit requirement of materiality." Government's Brief at 11.

In *Patterson v. New York, supra,* the Court explicitly held that the prosecution must "prove beyond a reasonable doubt all of the elements included in the *definition* of the offense of which the defendant is charged." 432 U.S. at 210 (emphasis added). The term "materiality" was specifically included by Congress in the definition of the false statement statute:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent

---

[18] This Court has noted that "the appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive." *Miller v. Fenton,* 474 U.S. 104, 113 (1985) (citations omitted). Moreover:

> an issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question- . . . . Perhaps much of the difficulty in this area stems from the practical truth that the decision to label and issue a "question of law" a "question of fact" or a "mixed question of law and fact" is sometimes as much a matter of allocation as it is of analysis.

Id. at 113-114 (citations omitted). In *Pullman-Standard v. Swint,* 456 U.S. 273, 288 (1982), the Court commented on the "vexing nature of the distinction between questions of fact and questions of law", and in *Baumgartner v. United States,* 322 U.S. 665, 671 (1944), the Court characterized the distinction as "often not illuminating" and "never self-executing."

> statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1001.

It is, of course, strictly the domain of Congress to determine and define the essential elements of any criminal offense. *See Blockburger v. United States,* 284 U.S. 299 (1932); *Missouri v. Hunter,* 459 U.S. 359 (1983); *United States v. Dixon,* 113 S.Ct. 2849 (1993); *United States v. Felix,* 112 S.Ct. 1377 (1992). As this Court stated in *Schad v. Arizona,* 111 S.Ct. 2491, 2500 (1991):

> Decisions about what facts are material and what are immaterial, or, in terms of *Winship,* 397 U.S., at 364, what "fact[s] [are] necessary to constitute the crime," and therefore must be proved individually, and what facts are mere means, represent value choices more appropriately made in the first instance by a legislature than by a court.

Accord: McMillan v. Pennsylvania, 477 U.S. 79, 85 (1986) ("*Patterson [v. New York, supra]* stressed that in determining what facts must be proved beyond a reasonable doubt the state legislature's definition of the elements of the offense is usually dispositive").

In *United States v. Rodgers,* 466 U.S. 475 (1984) this Court held that the term "jurisdiction" as used in 18 U.S.C. § 1001 to penalize false statements "in any matter within the jurisdiction of any department or agency of the United States," should not be given its "narrower, more technical meanings", but should be read in light of "[t]he most natural, non-technical reading of the statutory language" from Webster's Dictionary. *Id.* at 479-480.[19] The Court observed parenthetically that:

---

[19] The Court of Appeals had dismissed the indictment, interpreting "jurisdiction" to exclude false statements to the FBI that the defendant's wife had been kidnapped, and that she was involved in a plot to kill the

> If the statute referred only to courts, a narrower construction of the word "jurisdiction" might well be indicated; but referring as it does to "any department or agency" we think that such a narrow construction is simply inconsistent with the rest of the statutory language.

Id. at 482. Applying the same principles of statutory interpretation to the term "materiality," it is equally appropriate to avoid interpreting that term in a highly technical way that "clashes strongly with the sweeping, everyday language" of the rest of the statute, for the same reasons set forth by this Court in *Rodgers*. *Id.* at 480. So construed, the issue of "materiality" can readily be interpreted and understood by jurors as a factual matter. *Cf. United States v. Persky,* 520 F.2d at 287 (holding that a "reasonable citizen" would have no difficulty interpreting terms such as "material fact" or "any omission to state a material fact").

It may well be, as some courts following the rationale of *Sinclair* have reasoned, that materiality in some contexts is "a judicially-imposed limitation to insure the reasonable application of the statute." *See United States v. Abadi,* 706 F.2d 180 n. 2, quoted in *Kungys v. United States,* 485 U.S. at 772; *see also United States v. Lichenstein,* 610 F.2d at 1278. But where Congress has designated materiality to be an essential element of an offense, as it has with false statement prosecutions brought pursuant to 18 U.S.C. § 1001, then the distinction between issues of fact and law have little relevance to the determination whether the element must be decided by the jury. *See United States v. Mentz,* 840 F.2d 315, 319-320 (6th Cir. 1988) ("Regardless of how overwhelming the evidence may be, the Constitution delegates to the jury, not to the trial judge, the important task of deciding guilt or innocence." "There can be little doubt that a trial judge commits error of constitutional magnitude 'when he instructs the jury as a matter of law that a fact essential to the conviction has been

---

President, reasoning "that the investigation of kidnappings and the protection of the President are not matters 'within the jurisdiction' of the respective agencies, as that phrase is used in § 1001." 466 U.S. at 476-477.

established by the evidence, thus depriving the jury of the opportunity to make this finding.' "); *United States v. Whitehorse,* 807 F.2d 1426, 1430 (8th Cir. 1986) ("The issue rests not on a distinction between questions of law and questions of fact, but rather '[t]he issue is the role of the jury in the trial guaranteed to the accused.' ").

A fundamental defect of the Government's argument is evident from the circular reasoning in its discussion of legislative options:

> The post-*Winship* decisions actually support the validity of Section 1001's assignment of materiality to the court. It is clear from those decisions that Congress could have prohibited *all* false statements within the department or agency's jurisdiction, without regard to their materiality. Cf. *Patterson,* 432 U.S. at 209 (New York could have punished all intentional murders, without recognizing any affirmative defenses). Congress also could have punished all such false statements but made immateriality a defense. Cf. *ibid.* As a further alternative, Congress could have made immateriality a factor "affecting * * * the severity of the punishment," *id.* at 207, for consideration by the sentencing court. Cf. *McMillan v. Pennsylvania,* 477 U.S. 79, 85-86 (1986). In light of the options open to Congress, it is difficult to conclude that the one option foreclosed to it was assigning determination of materiality to the court.

Government's Brief at 39-40 (emphasis in original, footnote omitted). What the Government fails to acknowledge is that Congress *did* include materiality in the false statement statute, making it an essential element that must therefore be submitted to the jury. In *Patterson,* just the opposite occurred:

> We cannot conclude that Patterson's conviction under the New York law deprived him of due process of law. The crime of murder is defined by the statute, which represents a recent revision of the state criminal code, as causing the death of another person with intent to do so. The death, the intent to kill, and causation are the facts that the State is

> required to prove beyond a reasonable doubt if a person is to be convicted of murder. No further facts are either presumed or inferred in order to constitute the crime.

432 U.S. at 205-206.[20]

Therefore, the power of the legislature is not the issue; it is how that power was exercised which determines whether the jury must decide the issue, and who bears the burden of persuasion. In this case Congress has chosen to include materiality within the definition of the crime, making it an essential element that must be proven beyond a reasonable doubt to the satisfaction of the jury. *Patterson, supra,* 432 U.S. at 210.

IV. PRECEDENT AND HISTORY DO NOT JUSTIFY AN EXCEPTION TO THE HISTORIC ROLE OF THE JURY IN DECIDING ALL ELEMENTS OF A CRIMINAL CHARGE BEYOND A REASONABLE DOUBT

The Government argues that this Court should construe "the constitutional right to a jury trial in light of the practices observed in criminal jury trials when the Constitution was

---

[20] This is consistent with the holding of *Leland v. Oregon*, 343 U.S. 790 (1952), that the legislature can define offenses and designate affirmative defenses, even imposing upon the defendant the burden of proving the defense of insanity beyond a reasonable doubt.

This broad legislative power is not without limitation, however. This Court has indicated its willingness to invalidate legislative attempts to redefine an offense in any way that would circumvent the due process requirements of *Winship:*

> Moreover, if Winship were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.

Mullaney v. Wilbur, 421 U.S. at 698. *Accord: Schad v. Arizona,* 111 S.Ct. at 2503.

ratified and in later years." Government's Brief at 28. However, a more compelling argument can be made that precedent and history dictate the elimination of this anomalous exception to the due process principle that juries must decide all facts in a criminal case beyond a reasonable doubt.

The origins of the right to a jury trial are sacred, both in this country and in England, for "by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta." *Duncan v. Louisiana, supra*, 391 U.S. at 151. In 1765, Sir William Blackstone, whose works had an enormous influence in the United States as well as in England, referred to the English jury as the grand "palladium" of English liberty. 4 W.P. Blackstone, *Commentaries* * 350.

In *Duncan*, this Court articulated the importance of the constitutional right to a jury trial:

> [T]he jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

391 U.S. at 156. The Court explained that the "framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Ibid.* The inviolable separation of the roles of judge and jury is as old as the concept of the jury trial itself:

> The distinction between the province of the judge and that of the jury is, in the English law, clearly defined, and observed with jealous accuracy. The

> jury must in all cases determine the value and effect of the evidence. . . . The law throws upon them the whole responsibility of ascertaining facts in dispute, and the judge does not attempt to interfere with the exercise of their unfettered discretion in this respect.

W. Forsyth, *History of Trial by Jury*, 235 (Morgan Ed. 1875).

The Government relies heavily upon the common law tradition of allowing judges to determine materiality in perjury cases to justify a glaring exception to the broad, historic principle, dating back to the Magna Carta, that the judge should have no part in deciding the facts of any case. However, this Court, in *Williams v. Florida*, 399 U.S. 78, 92 (1970), rejected the "assumption . . . that if a given feature existed in a jury at common law in 1789, then it was necessarily preserved in the Constitution."

In *Williams*, the Court examined the history of the constitutional provisions guaranteeing a jury trial, ultimately rejecting the defendant's argument that the Sixth Amendment required a twelve person jury because that was the practice at common law. *Id.* at 92. "While 'the intent of the Framers' is often an elusive quarry, the relevant constitutional history casts considerable doubt on the easy assumption in our past decisions that if a given feature existed in a jury at common law in 1789, then it was necessarily preserved in the Constitution." *Ibid.* The Court recounted the "very scanty history" of the provisions of Article III guaranteeing that "[t]he trial of all Crimes . . . shall be by jury," *id.* at 93, and the compromise version of the Sixth Amendment that emerged from the House and Senate, noting that several of the common law features were eliminated from the Sixth Amendment in the process. *Id.* at 93-97. The Court concluded

> there is absolutely no indication in the "intent of the Framers" of an explicit decision to equate the constitutional and common law characteristics of the jury. . . . The relevant inquiry, as we see it, must be the function that the particular feature performs in its relation to the purposes of the jury trial. Measured by this standard, the twelve-man requirement

> cannot be regarded as an indispensable component of the Sixth Amendment.

Id. at 99-100.

This discussion makes clear, contrary to the Government's assertions, that common law traditions, no matter how ancient (or antiquated), certainly need not be read into the Sixth Amendment. Rather, the "relevant inquiry . . . must be the function that the particular feature performs and its relation to the purposes of the jury trial." *Id.* at 99-100. The most important purpose of the jury trial was described by the Court in *Williams* as follows:

> Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence. The performance of this role is not a function of the particular number of the body that makes up the jury. . . . And, certainly, the reliability of the jury as a factfinder hardly seems likely to be a function of its size.

Id. at 100-101. Applying these principles, the Court held:

> We conclude, in short, as we began: the fact that the jury at common law was composed of precisely twelve is a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance "except to mystics." *Duncan v. Louisiana, supra*, at 182 (Harlan, J., dissenting). To read the Sixth Amendment as forever codifying a feature so incidental to the real purpose of the Amendment is to ascribe a blind formalism to the Framers which would require considerably more evidence than we have been able to discover in the history and language of the Constitution or in the reasoning of our past decisions.

Id. at 102-103.

The Government's argument that the issue of materiality has traditionally been taken from the jury in other contexts

falls more neatly into the category of "historical accident" than fundamental purpose. This common law anachronism is squarely at odds with the fundamental purpose of the jury, "the interposition between the accused and his accuser of the common sense judgment of a group of laymen" to assure "the reliability of the jury as a factfinder." *Id.* at 100.

Finally, the Court in *Williams* made clear that legislatures should have the freedom to "have their own views about the relative value of the larger and smaller juries." *Id.* at 103. In this case, Congress has expressed its view that materiality is an essential element of the false statement statute, and should not be prohibited from doing so by reliance on common law traditions incorporated through the *Sinclair* dictum. As this Court recognized in *Williams*: "Our holding does no more than leave these considerations to Congress and the States, unrestrained by an interpretation of the Sixth Amendment that would forever dictate the precise number that can constitute a jury." *Id.* at 103.

A. The Extent of Due Process Protections, and of the Sixth Amendment Right to a Jury Trial Have Evolved Substantially Since this Court's Decision in Sinclair.

The Government observes: "As this Court has stated from its first Due Process cases, traditional practice provides a touchstone for constitutional analysis." Government's Brief at 26, citing *Honda Motor Co. v. Oberg,* 114 S.Ct. 2331, 2339 (1994). However, the Court in *Oberg* also cautioned that "to hold all procedural change unconstitutional 'would be to deny every quality of the law but its age, and to render it incapable of progress or improvement.' " 114 S.Ct. at 2340, quoting *Hurtado v. California,* 110 U.S. 516, 529 (1884).

Almost without exception, each of the cases cited by the Government in support of this proposition involved the "fundamental fairness" rubric of the Fourteenth Amendment Due Process Clause, Government's Brief at 26-31, but such analysis is primarily utilized with federal challenges to state procedures, where "States must be permitted a degree of

flexibility." *Schad v. Arizona,* 111 S.Ct. at 2500.[21] In *Schad,* the court noted the limited value of history and tradition even in this context:

> This is not to say that either history or current practice is dispositive. . . . Conversely, "neither the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack." (citations omitted) In fine, history and current practice are significant indicators of what we as a people regard as fundamentally fair and rational ways of defining criminal offenses, which are nevertheless always open to critical examination.

Id. at 2502-2503 (internal quotations omitted).[22]

---

[21] The Court in *Oberg*, and other cases cited by the Government for this proposition, *see* Government's Brief at 26-28, was concerned with due process challenges to state procedures, such as the prohibition of judicial review of punitive damage awards, the issue in *Oberg*. The analysis employed in such cases is of questionable relevance to the explicit, Sixth Amendment structural guarantee that a jury must decide the facts in a criminal case, for federal scrutiny of state procedures under the auspices of the Fourteenth Amendment Due Process Clause permits states to devise their own procedure unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Dowling v. United States,* 493 U.S. 342, 352 (1990); *United States v. Lovasco*, 431 U.S. 783, 790 (1977); *Speiser v. Randall*, 357 U.S. 513, 523 (1958); *Leland v. Oregon*, 343 U.S. at 798; *Snyder v. Massachusetts*, 291 U.S. 97 (1934).

[22] This Court has repeatedly made clear that there are limits to such attacks under the Fourteenth Amendment:

> It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, *Irvine v. California*, 347 U.S. 128, 134 (1954) (plurality opinion), and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States.

Leland v. Oregon, 432 U.S. at 201. As noted by the Court in *Dowling v. United States, supra,* 493 U.S. at 352: "We, therefore, have defined the category of infractions that violate 'fundamental fairness' very narrowly."

In contrast to the limited nature of due process challenges to state procedures, the language of Article III, that "[t]he trial of all Crimes . . . shall be by Jury," and the language of the Sixth Amendment that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury, . . . " creates "a structural guarantee that 'reflect[s] a fundamental decision about the exercise of official power - a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.' " *Duncan v. Louisiana*, 391 U.S. at 156. As with other textual guarantees directly applicable to federal prosecutions, the role of history and tradition must give way to the explicit commands of the Bill of Rights. *Cf. Coy v. Iowa*, 487 U.S. 1012, 1017 (1988) ("literal right to 'confront' the witness at the time of trial" described "as forming 'the core values furthered by the Confrontation Clause.' " citing *California v. Green*, 399 U.S. 149, 157 (1970)).

Moreover, the Government's suggestion that the full extent of the Sixth Amendment right to a jury trial has remained static since this Court's decision in *Sinclair* more than 65 years ago is clearly untenable, for *Sinclair's* foundation no longer rests on solid ground. The *Sinclair* holding, that "[i]t would be incongruous and contrary to well-established principles to leave the determination of such a matter to a jury," 279 U.S. at 299, relied on two earlier precedents, *Interstate Commerce Commission v. Brimson*, 154 U.S. 447 (1894) and *Horning v. District of Columbia*, 254 U.S. 135 (1920).

The *Brimson* case held there is no right to a jury trial in prosecutions for criminal contempt, a decision that has been effectively overruled by this Court in *Bloom v. Illinois*, 391 U.S. 194 (1968). In *Bloom*, the Court rejected a Government

---

Accord: Medina v. California, 112 S.Ct. 2572, 2577 (1992) (a procedure must offend "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" citing *Patterson v. New York,* 432 U.S. at 202. "Historical practice is probative of whether a procedural rule can be characterized as fundamental. See *ibid.*; *In re Winship,* 397 U.S. 358, 361 (1970).").

argument against the right to a jury trial for criminal contempt based upon "strong, though sharply challenged historical support," reasoning that "the ultimate question is not whether the traditional doctrine is historically correct but whether the rule that criminal contempts are never entitled to a jury trial is a necessary or an acceptable construction of the Constitution." *Id.*, at 198-199 and n. 2.

The other case relied upon by the Court in *Sinclair, Horning v. District of Columbia, supra*, presents a compelling argument for abandoning the *Sinclair* dictum. The defendant in *Horning* had moved his pawnbroking business out of Washington, D.C., in anticipation of a newly enacted law making it illegal there, but he maintained a "free automobile service from there to Virginia" where the transactions continued, and he was eventually charged for violating the new law against pawnbrokers in the District of Columbia. 254 U.S. at 136. When the jury refused to return a prompt verdict, the judge recalled them to the courtroom and effectively ordered them to convict the defendant. *Id.* at 138. While conceding that "there was a regrettable peremptoriness of tone" in the court's instructions, the Court concluded that "[i]f the defendant suffered any wrong it was purely formal since, as we have said, on the facts admitted there was no doubt of his guilt." *Id.* at 139 (citation omitted).

Not surprisingly, Mr. Justice Brandeis vigorously dissented, joined by the Chief Justice and Justice Day, reasoning "that the judge is without power to direct a verdict of guilty although no fact is in dispute." 254 U.S. at 139 (citations omitted). The dissent characterized the trial court's charge to the jurors as "a moral command, and being yielded to, substitutes the will of the judge for the conviction of the jury." *Ibid.* Justice Brandeis declared:

> Whether a defendant is found guilty by a jury or is declared to be so by a judge is not, under the Federal Constitution a mere formality. The offense here in question is punishable by imprisonment. Congress would have been powerless to provide for imposing the punishment except upon the verdict of the jury. . . . Because the presiding judge usurped

> the province of the jury, I am unable to concur in the judgment of the court.

Id. at 140. Of course, the notion that the judge can direct a verdict in a criminal case has often been rejected in subsequent decisions of this Court. *See, e.g., Morissette v. United States, supra; United States v. United States Gypsum Co., supra*, 438 U.S. at 446; *Sandstrom v. Montana*, 442 U.S. at 520-524.

Numerous decisions make clear that this Court's interpretation of the right to a jury trial has not remained static since 1929, when *Sinclair* was decided. *See, e.g., Duncan v. Louisiana, supra* (first applied to the States); *Burch v. Louisiana*, 441 U.S. 130 (1979) (unanimity required for six person juries); *Bloom v. Illinois, supra*, and *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974) (jury required for criminal contempt); *United Mine Workers v. Bagwell*, 114 S.Ct. 2552 (1994) (jury required for criminal contempt *fine*); *Sandstrom v. Montana, supra*, and *Carella v. California, supra*, (use of traditional presumptions violates both due process and Sixth Amendment right to have jury decide every fact necessary for conviction).

B. None of the Other Circuit Court of Appeals Decisions Seriously Considered the Constitutional Implications of Allowing the Court to Decide Materiality.

The Government's answer to *Winship* and the Sixth Amendment cases discussed above is contained in the oft-stated refrain that, "[b]ecause materiality is a question of law rather than a question of fact, it need not be submitted to the jury." Government's Brief at 37. It is, of course, a truism that questions of law are generally reserved for the court, such as preliminary determinations concerning the admissibility of evidence, the example cited in the Government's Brief. *See*

Fed. R. Evid. 106.[23] But the simplistic syllogism that "materiality is a question of law, therefore judges should decide it," does little to address, much less justify this glaring exception to the Fifth and Sixth Amendments.

The vast majority of cases from other circuits make no mention of *Winship* or the Sixth Amendment cases discussed above, but simply recite the dictum of *Sinclair*, a case involving prosecution for contempt of Congress that predates *Winship* and its progeny by more than four decades. *See* n. 1, *supra*.

The only two circuit court of appeal cases that even mention this Court's decision in *Winship* distinguish its rationale with the dubious assertion that "a sound argument might be made that materiality is a 'historical exception' to the general due process mandate of *Winship* that each essential element of the crime charged must be submitted to the jury." *United States v. Daily*, 921 F.2d 994, 1003-1006 (10th Cir. 1990) (citation omitted). The reasoning from *United States v. Abadi*, *supra*, is equally suspect:

> We do not believe that the materiality requirement should be treated as an "element" of 18 U.S.C. § 1001 in the sense that the prosecution must prove materiality beyond a reasonable doubt. *In Re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072 (1970); *cf. United States v. Giacalone*, 587 F.2d at 7. Instead, we view the materiality requirement as a judicially imposed limitation to insure the reasonable application of the statute. Thus, the district court is required to find, as a matter of law, that the

---

[23] The Federal Rules of Evidence provide a comprehensive guide for trial judges governing evidentiary rulings such as relevance (Article IV), privilege (Article V), expert and opinion testimony (Article VII), and hearsay (Article VIII). *See Daubert v. Dow Chemical Co., Inc.*, 113 S.Ct. 2786 (1993). However, the rules of evidence are specifically subject to constitutional limitation. *See, e.g., Davis v. Alaska*, 415 U.S. 308 (1974) (confrontation); *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) (due process); *Rock v. Arkansas*, 483 U.S. 44 (1987) (constitutional right to testify).

> false statement or representation is material in a prosecution under section 1001.

706 F.2d 178, 180, fn. 2 (6th Cir. 1983), cited in *Kungys*, 485 U.S. at 772. As discussed above, *supra* at 34-39, materiality is an essential element, included by Congress in the definition of 18 U.S.C. § 1001, not a "judicially imposed limitation."

V. CONCLUSION

This Court commented in *United Mine Workers v. Bagwell*, *supra*, that "[t]he use of a civil process for contempt sanctions 'makes no sense except as a consequence of historical practice.'" 114 S.Ct. 2565 (quoting *Weiss v. United States*, 114 S.Ct. 752, 771 (1994) (Scalia, J., concurring in part and concurring in judgment). This same appraisal accurately describes the practice of allowing judges to decide the issue of materiality, for the vast majority of cases from the other circuits have simply recited the antiquated dictum of *Sinclair* to justify their holdings, and *Sinclair's* viability is questionable, or at best inapposite where the issue of materiality is an essential element of a criminal offense.

The vice of this anachronistic practice lies not only in the irreconcilable and indefensible conflict it has created with modern statutes criminalizing bank fraud, wire fraud, mail fraud, and securities fraud, where the jury routinely decides the issue of materiality; it also does violence to

the most basic constitutional principles of due process and the fundamental right to a jury trial in criminal cases.

Accordingly, the decision below should be affirmed.

Respectfully Submitted,

ALLEN, HANSEN & MAYBROWN, P.S.
RICHARD HANSEN
Counsel of Record

DAVID ALLEN
TODD MAYBROWN
Counsel for Respondent

1001 Fourth Avenue, #4301
Seattle, Washington 98154
(206) 447-9681

Supreme Court, U.S.
FILED
APR 10 1995
OFFICE OF THE CLERK

No. 94-514

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL E. GAUDIN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

TABLE OF AUTHORITIES

Cases:	Page
Basic Inc. v. *Levinson*, 485 U.S. 224 (1988)	5
Commonwealth v. *McDuffee*, 398 N.E.2d 463 (Mass. 1979)	10
Daubert v. *Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993)	17
Dowling v. *United States*, 493 U.S. 342 (1990)	16
Duncan v. *Louisiana*, 391 U.S. 145 (1968)	17
Horning v. *District of Columbia*, 254 U.S. 135 (1920)	18, 19
ICC v. *Brimson*, 154 U.S. 447 (1894)	18
J.E.B. v. *Alabama*, 114 S. Ct. 1419 (1994)	16
Kungys v. *United States*, 485 U.S. 759 (1988)	1, 7, 15
M'Lanahan v. *Universal Ins. Co.*, 26 U.S. (1 Pet.) 170 (1828)	5
Medina v. *California*, 113 S. Ct. 2572 (1992)	15
Miller v. *Fenton*, 474 U.S. 104 (1985)	4
Morissette v. *United States*, 342 U.S. 246 (1952)	14
People v. *Hedgecock*, 795 P.2d 1260 (Cal. 1990)	10, 11, 12
Railroad Co. v. *Stout*, 84 U.S. (17 Wall.) 657 (1873)	6
SEC v. *Maio*, Nos. 93-1233 & 94-1234, 1995 WL 117091 (7th Cir. Mar. 21, 1995)	6
SEC v. *Steadman*, 967 F.2d 636 (D.C. Cir. 1992)	6
Sinclair v. *United States*, 279 U.S. 263 (1929)	1, 17, 18
State v. *Anderson*, 603 A.2d 928 (N.J. 1992)	10
State v. *Sands*, 467 A.2d 202 (N.H. 1983)	9, 16
Sullivan v. *Louisiana*, 113 S. Ct. 2078 (1993)	18
TSC Indus., Inc. v. *Northway, Inc.*, 426 U.S. 438 (1976)	5, 6
Taylor v. *Louisiana*, 419 U.S. 522 (1975)	16
United States v. *Abadi*, 706 F.2d 178 (6th Cir.), cert. denied, 464 U.S. 821 (1983)	19
United States v. *Arch Trading Co.*, 987 F.2d 1087 (4th Cir. 1993)	3

Cases—Continued: Page

United States v. *Daily*, 921 F.2d 994 (10th Cir. 1990), cert. denied, 502 U.S. 952 (1991) 19
United States v. *Greenberg*, 735 F.2d 29 (2d Cir. 1984) 7
United States v. *Guy*, 456 F.2d 1157 (8th Cir.), cert. denied, 409 U.S. 896 (1972) 15
United States v. *Hansen*, 772 F.2d 940 (D.C. Cir. 1985), cert. denied, 475 U.S. 1045 (1986) 8
United States v. *Hernandez-Fundora*, No. 93-1632 1995 WL 67811 (2d Cir. Feb. 14, 1995) 14
United States v. *Howard*, 855 F.2d 832 (11th Cir. 1988) 15
United States v. *Jackson*, 436 F.2d 39 (9th Cir. 1970), cert. denied, 403 U.S. 906 (1971) 14
United States v. *Lovasco*, 431 U.S. 783 (1977) 16
United States v. *Paxson*, 861 F.2d 730 (D.C. Cir. 1988) .. 19
United States v. *Rodgers*, 466 U.S. 475 (1984) 13
United States v. *Staniforth*, 971 F.2d 1355 (7th Cir. 1992) 10, 11
United States v. *Taylor*, 693 F. Supp. 828 (N.D. Cal. 1988) 10, 18
United States v. *Warren*, 984 F.2d 325 (9th Cir. 1993) 14
Williams v. *Florida*, 399 U.S. 78 (1970) 16
Winship, In re, 397 U.S. 358 (1970) 15

Constitution, statutes and regulations:

U.S. Const.:
Amend. V (Due Process Clause) 12
Amend. VI 12, 13, 16
15 U.S.C. 77q(a)(2) 5
15 U.S.C. 78j(b) 5
18 U.S.C. 1001 ..... 1, 2, 3, 4-5, 7, 9, 13
18 U.S.C. 1014 10
18 U.S.C. 1341 5
18 U.S.C. 1343 5
18 U.S.C. 1344 5
Ala. Code § 13A-10-100(b)(2) (1984) 9
Ariz. Rev. Stat. Ann. § 13-2701(1) (1989) 9

Statutes and rules—Continued: Page

Ark. Code Ann. § 5-53-101(a)(2) (Michie 1993) 9
Colo. Rev. Stat. § 18-8-501(1) (1986) 9
Fla. Stat. Ann. § 837.021(2) (West 1994) 9
Haw. Rev. Stat. § 710-1000(9) (1985) 9
Ky. Rev. Stat. Ann. § 523.010(1) (Michie/Bobbs-Merrill 1990) 9
Me. Rev. Stat. Ann. tit. 17A, § 451(2) (West 1983) 9
Mont. Code Ann. § 45-7-201 (3) (1993) 10
Neb. Rev. Stat. § 28-915(3) (1989) 10
N.D. Cent. Code § 12.1-11-04(1) (1985) 10
N.H. Rev. Stat. Ann. § 641:1(II) (1986) 10
18 Pa. Cons. Stat. Ann. § 4902(b) (1983) 10
Tex. Penal Code Ann. § 37.04(c) (West 1994) 10
Utah Code Ann. § 76-8-501(2) (1995) 10
17 C.F.R.:
Section 240.10b-5 (Rule 10b-5) 5
Section 240.14a-9 (Rule 14a-9) 5
Section 240.14e-3 (Rule 14e-3) 6

Miscellaneous:

22 J. Appleman, *Insurance Law & Practice* (rev. ed. 1979) 6
S. Marshall & J. Condy, *A Treatise on the Law of Insurance* (2d ed. 1810) 6
J. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (reprint 1969) (1898) 6
S. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 Cal. L. Rev. 1867 (1966) 6

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-514

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL E. GAUDIN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Respondent does not challenge the key points underlying our submission that, in a prosecution for false statements under 18 U.S.C. 1001, the materiality of the statements is determined by the judge rather than the jury. Specifically, respondent does not dispute that materiality has historically been determined by the judge rather than the jury in prosecutions for perjury. Nor does he dispute that this Court relied on that historical practice in *Sinclair* v. *United States*, 279 U.S. 263 (1929), and *Kungys* v. *United States*, 485 U.S. 759, 770 (1988), to hold that materiality was a question of law to be decided by the court under statutes analogous to perjury. Finally, he does not dispute that Section 1001, like the statutes at issue in *Sinclair* and

Kungys, is analogous to perjury insofar as it prohibits false statements to public entities.

Respondent nonetheless argues that materiality under Section 1001 must be determined by the jury, for essentially three reasons. First, he argues that materiality is determined by the jury in certain actions involving false statements to private entities. Second, he argues that this Court failed in either *Sinclair* or *Kungys* to consider the fundamental principle that a criminal defendant is entitled to have the jury find every fact necessary to constitute the charged offense. Finally, he argues that, because materiality is an essential element of the false statement offense proscribed by Section 1001, the Constitution requires it to be determined by the jury. None of respondent's arguments undermines our submission that the resolution by the court of the materiality of false statements to public officials is constitutional.

1. In our opening brief, we argued that materiality has historically been treated as an issue of law to be decided by the judge rather than the jury in prosecutions for perjury. U.S. Br. 16-21. To meet that argument directly, respondent would be required either (1) to dispute our account of the historical treatment of materiality in perjury prosecutions, or (2) to explain why it should be disregarded in interpreting Section 1001. Respondent does neither.

Instead, respondent argues that "'materiality' is essentially a 'fact-bound' inquiry." Resp. Br. 3. In support of that argument, he relies on the Ninth Circuit's analysis in this case, see *id.* at 5 (quoting Pet. App. 17a), and on cases decided in "other contexts," besides perjury prosecutions, in which materiality is determined by the jury rather than the

court, Resp. Br. 7. The Ninth Circuit's analysis is flawed, however, and the case law on which respondent relies is inapposite.

a. In the passage of the Ninth Circuit's opinion quoted by respondent, the court stated that materiality is a "fact-bound" inquiry under Section 1001 for two reasons specific to this case: (1) that "[o]ne cannot look at * * * a particular statute or regulation to determine what would affect the decision of the [Department of Housing and Urban Development (HUD)] to insure a[] [Federal Housing Administration (FHA)] loan," but instead "[i]t was necessary to take testimony of department officials" to make that determination; and (2) that some of the amounts on the HUD loan forms that respondent falsely represented would be paid to, or paid by, the strawbuyers "were trivial." Pet. App. 17a.

The Ninth Circuit erred by attaching importance to the fact that a HUD official testified in this case. See also National Ass'n of Criminal Defense Lawyers (NACDL) Amicus Br. 5 (emphasizing "testimonial" nature of evidence). The official's testimony concerned the manner in which applications for FHA-insured loans are processed. See Pet. App. 5a; see also 2 Tr. 442. The same type of information may often be set forth in regulations or agency publications. Cf., *e.g.*, *United States* v. *Arch Trading Co.*, 987 F.2d 1087, 1095 (4th Cir. 1993) (relying on regulation to determine that defendant's false statement to Department of the Treasury was material). The source of the information does not alter its character as a description of the agency's lawful functions. That the information was, in this case, introduced through testimony rather than agency documents does not indicate that materiality is a

factual issue to be determined by the jury in prosecutions under Section 1001.

The Ninth Circuit also erred by relying on the "trivial" nature of the amounts of money involved in some of respondent's misrepresentations. Pet. App. 17a. As the dissent below explained, "[t]he proper question is whether false entries on a key line of a government-approved loan application have 'a natural tendency to affect' the agency's decision, regardless of the amount in question." *Id.* at 41a (Kozinski, J., dissenting). That question calls for "a generalized determination * * * that does not vary significantly with the facts of each individual transaction." *Id.* at 42a-43a.

As we explain in our opening brief, the Ninth Circuit's fundamental error was its view that materiality may be decided by the court, rather than the jury, "[o]nly if it can be said that there is *no* factual component to the determination of materiality." Pet. App. 13a (emphasis added); see U.S. Br. 42-43. As respondent recognizes, however, the classification of an issue as one of law, to be decided by the court, or one of fact, to be decided by the trier of fact, may be "as much a matter of allocation as it is of analysis." Resp. Br. 35 n.18 (quoting *Miller* v. *Fenton*, 474 U.S. 104, 113-114 (1985)). That a determination of materiality may entail assessment of the facts means only that it "falls somewhere between a pristine legal standard and a simple historical fact." *Miller*, 474 U.S. at 114. It does not invalidate history's allocation of materiality determinations to the judge in settings analogous to this case.

b. Respondent contends that materiality should be determined by the jury in prosecutions under Section

1001 because materiality is a jury question in "other contexts" besides perjury prosecutions. Resp. Br. 7. Respondent's reliance on the treatment of materiality in those other contexts is misplaced.

The other contexts discussed by respondent involve misrepresentations or concealments directed at private, rather than public, entities. Respondent discusses the materiality requirement of the federal provisions prohibiting securities fraud, 15 U.S.C. 77q(a)(2) and 78j(b) (Resp. Br. 8-14); mail fraud, 18 U.S.C. 1341, wire fraud, 18 U.S.C. 1343, and bank fraud, 18 U.S.C. 1344 (Resp. Br. 15-19); and "[t]he question of materiality in cases concerning recision of insurance coverage based on material misstatements or omissions" (Resp. Br. 19; see also *id.* at 19-21). The materiality requirement in those contexts is defined by reference to the possible effect of a misrepresentation or concealment on a reasonable person. For example, a fact omitted from a proxy solicitation is material "if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *TSC Indus., Inc.* v. *Northway, Inc.*, 426 U.S. 438, 449 (1976); see also *Basic Inc.* v. *Levinson*, 485 U.S. 224, 231-232 (1988) (adopting *TSC* standard for Securities and Exchange Commission (SEC) Rule 10b-5, 17 C.F.R. 240.10b-5).[1]

---

[1] See also Resp. Br. 8 (pattern jury instruction for materiality in actions for securities fraud), 14 (quoting materiality standard for civil action under SEC Rule 14a-9, 17 C.F.R. 240.14a-9, adopted in *TSC*), 17-18 (pattern jury instruction for materiality in actions for mail, wire, and bank fraud), 19 (quoting *M'Lanahan* v. *Universal Ins. Co.*, 26 U.S. (1 Pet.) 170, 188-189 (1828) (materiality standard for actions concerning misrepresentation or concealment in insurance

When materiality is based on the response to a set of facts of a reasonable private person, it is "analogous" to the negligence determination in tort actions, which also requires application of a reasonable person standard. *TSC*, 426 U.S. at 450 & n.12. The determination of negligence in tort actions is assigned to the jury, rather than the judge, because of the jury's "unique competence" to decide how a reasonable person would act. *Ibid.*; see also, *e.g.*, *Railroad Co.* v. *Stout*, 84 U.S. (17 Wall.) 657, 663-664 (1873); J. Thayer, *A Preliminary Treatise on Evidence at the Common Law* 225-228, 252-253 (reprint 1969) (1898); S. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 Cal. L. Rev. 1867, 1876-1877 (1966).

The jury's "unique competence" to apply the reasonable person standard in negligence cases and other actions involving the conduct of private parties does not justify assigning the materiality deter-

---

contracts)); see also, *e.g.*, *SEC* v. *Maio*, Nos. 94-1233 & 94-1234, 1995 WL 117091, at *12 (7th Cir. Mar. 21, 1995) (discussing materiality requirement for violations of SEC Rules 10b-5 and 14e-3, 17 C.F.R. 240.14e-3); *SEC* v. *Steadman*, 967 F.2d 636, 643 (D.C. Cir. 1992) ("general definition of materiality under federal securities laws" refers to importance of omitted or misrepresented fact to "reasonable shareholder"); 22 J. Appleman, *Insurance Law & Practice* § 13041, at 338 (rev. ed. 1979) (sample jury instruction on materiality standard, summarized as "whether responsible, careful and intelligent insurance underwriters would have recommended insurance" based on misrepresentations by applicant); 1 S. Marshall & J. Condy, *A Treatise on the Law of Insurance* 467 (2d ed. 1810) ("Every fact and circumstance which can possibly influence the mind of any prudent and intelligent insurer, in determining whether he will underwrite the policy at all, or at what premium he will underwrite it, is material.").

mination to the jury in prosecutions under Section 1001 and other statutes involving false statements to public entities. Under those statutes, materiality is not based on a reasonable private person standard. It is instead tied to the legal responsibilities of the particular governmental decisionmaker to which the false statement was addressed. As the Second Circuit has explained:

> Where a false statement is made to a public body or its representative, materiality refers to the impact that the statement may reasonably have on the ability of that agency to perform the functions assigned to it by law. The question is not what effect the statement actually had; its actual effect would plainly present an issue of fact. The question is rather whether the statement had the potential for an obstructive or inhibitive effect. A consideration of this potential requires an analysis of the responsibilities of the public agency—responsibilities that are assigned by law—and analysis of the relevance of the statement to those responsibilities. Both relevance and the nature of a duty are traditionally questions of law to be decided by the court. Perforce the interrelationship of these two legal questions is a question of law.

United States v. *Greenberg*, 735 F.2d 29, 31 (1984).

The classic definition of materiality in a Section 1001 case is whether the concealment or misrepresentation "has a natural tendency to influence, or was capable of influencing, the decision of the decision-making body to which it was addressed." *Kungys*, 485 U.S. at 770 (internal quotation marks omitted). The materiality requirement in most contexts indicates

that the misrepresented or concealed fact would have had some influence on the decisionmaker, even though the fact need not have actually affected the decision in question. But what is distinctive about the materiality requirement in statutes prohibiting false statements to public officials is that the decisions of those officials are governed by legal requirements, rather than what a reasonable private person may have considered important.

Thus, materiality depended in this case on the potential effect of respondent's misrepresentations on HUD's discharge of its official responsibilities, rather than on their significance to any particular individual in that agency. See Resp. Br. 1 (respondent disputed whether his misrepresentations were of "significance to FHA"); see also Pet. App. 17a (recognizing that materiality depended on "what would affect the decision of the HUD to insure an FHA loan"); cf. *United States* v. *Hansen*, 772 F.2d 940, 950 (D.C. Cir. 1985), cert. denied, 475 U.S. 1045 (1986).

In sum, although determinations of "materiality" are made in actions involving false statements to private entities and in actions involving false statements to public entities, the character of the determination in the two settings differs. In actions involving private entities, materiality is based on a reasonable person standard that juries have long been considered competent to apply. In actions involving public entities, materiality is based on the possible impact of a misrepresentation or concealment on the legal duties of the entity, a determination that judges rather than juries are competent to make. Because

this case arises in the second setting, respondent's reliance on case law in the first setting is misplaced.[2]

2. Respondent challenges the government's reliance on *Sinclair* and *Kungys*, asserting that "a growing number of recent decisions" have declined to follow the "antiquated dictum of *Sinclair*" and the "more recent dictum in *Kungys*." Resp. Br. 21, 26. As we show in our opening brief, however, the trend is in the opposite direction. Every regional court of appeals except the Ninth Circuit has held that materiality is determined by the judge in prosecutions under Section 1001. See U.S. Br. 22 & n.15. Moreover, numerous courts of appeals, including the Ninth Circuit, have reached the same conclusion for other federal statutes proscribing false statements to public entities. See *id.* at 30 n.22. Appellate courts in at least 20 States have reached that conclusion with respect to analogous state statutes. See *id.* at 29 n.21; see also *State* v. *Sands*, 467 A.2d 202, 215-216 (N.H. 1983).[3]

---

[2] Respondent asserts (Resp. Br. 14, 18) that the materiality determination may be equally "complex" whether a case involves a false statement to a private entity or one to a public entity. As we explain in our opening brief and in the text, pp. 8-9, *supra*, however, it is the nature of the determination, rather than its complexity, that is relevant in deciding whether the determination should be made by the judge or the jury. U.S. Br. 43-44.

[3] In addition, several States provide by statute that the materiality of an allegedly perjured statement is a question of law to be determined by the court. See, *e.g.*, Ala. Code § 13A-10-100(b)(2) (1984); Ariz. Rev. Stat. Ann. § 13-2701(1) (1989); Ark. Code Ann. § 5-53-101(a)(2) (Michie 1993); Colo. Rev. Stat. § 18-8-501(1) (1986); Fla. Stat. Ann. § 837.021(2) (West 1994); Haw. Rev. Stat. § 710-1000(9) (1985); Ky. Rev. Stat. Ann. § 523.010(1) (Michie/Bobbs-Merrill 1990); Me. Rev. Stat. Ann. tit.

To counter that overwhelming body of case law, respondent identifies only three decisions—two by state supreme courts, and one by a federal district court. See Resp. Br. 23-26 (discussing *United States* v. *Taylor*, 693 F. Supp. 828, 839 (N.D. Cal. 1988); *State* v. *Anderson*, 603 A.2d 928, 932-935 (N.J. 1992); *Commonwealth* v. *McDuffee*, 398 N.E.2d 463, 467-470 (Mass. 1979)). Although those decisions hold that materiality is determined by the jury under a statute proscribing false statements to a public entity, they provide only limited support for respondent's position. *Taylor* arose in the Ninth Circuit and is based on the same erroneous precedent of that court as the decision below. 693 F. Supp. at 833-835. *Anderson* is based on a state, not the federal, constitution. 603 A.2d at 935. Finally, *McDuffee* is based largely on the view that "[e]arly English case law presents a split of opinion as to whether the issue of materiality should be treated as a question of law." 398 N.E.2d at 467. We show in our opening brief that that view is mistaken, and, significantly, respondent does not challenge that showing. See U.S. Br. 16-21.

The other two decisions cited by respondent provide no support for his position. See Resp. Br. 21-22, 25-26 (discussing *United States* v. *Staniforth*, 971 F.2d 1355 (7th Cir. 1992), and *People* v. *Hedgecock*, 795 P.2d 1260 (Cal. 1990)). *Staniforth* involved a prosecution for bank fraud under 18 U.S.C. 1014. 971 F.2d

---

17A, § 451(2) (West 1983); Mont. Code Ann. § 45-7-201(3) (1993); Neb. Rev. Stat. § 28-915(3) (1989); N.H. Rev. Stat. Ann. § 641:1(II) (1986); N.D. Cent. Code § 12.1-11-04(1) (1985); 18 Pa. Cons. Stat. Ann. § 4902(b) (1983); Tex. Penal Code Ann. § 37.04(c) (West 1994); Utah Code Ann. § 76-8-501(2) (1995); see also U.S. Br. 18 (citing similar British statute).

at 1358. *Hedgecock* involved a perjury prosecution under a state political reform law designed to inform voters about the financial affairs of elected officials. 795 P.2d at 1264-1265. The court in each case recognized that the materiality standard under such statutes is different from the materiality standard under statutes proscribing false statements to public entities. *Staniforth*, 971 F.2d at 1358; *Hedgecock*, 795 P.2d at 1265-1266. Accordingly, the court in each case concluded that case law concerning the latter type of statute—including this Court's decisions in *Sinclair* and *Kungys*—is inapposite to the question whether materiality under statutes involving false statements or concealments directed at private persons is determined by the judge or the jury. *Staniforth*, 971 F.2d at 1358; *Hedgecock*, 795 P.2d at 1265-1267.

In particular, the court in *Staniforth*, while not ultimately deciding whether materiality in a bank fraud prosecution is a question of law, 971 F.2d at 1359, explained, *id.* at 1358:

> *Kungys* involved a false statement to a government agency * * *, and the tendency of a statement to mislead the government depends on its relevance to the criteria applied by the agency. * * * Relevance is a legal determination. Juries are told what is relevant; they do not make determinations of relevance. But the question whether a false statement to a bank or other business firm is capable of influencing the firm's decisions is no more a question of law than whether a false statement to a prospective investor is capable of influencing his decision to invest and therefore is material to that decision.

The court in *Hedgecock* found *Sinclair* and *Kungys* inapposite on similar grounds, and relied instead on this Court's decision in *TSC*, which, as discussed above, involved material concealments from private entities. See *Hedgecock*, 795 P.2d at 1267. Thus, far from supporting respondent, *Staniforth* and *Hedgecock* undermine his reliance on case law assigning the materiality determination to juries under statutes proscribing false statements to or for the benefit of private, rather than public, entities.

3. Respondent asserts that the Due Process Clause and the Sixth Amendment compel a jury determination of materiality because it is an element of the offense. Resp. Br. 27-39. The decisions on which he relies, however, do not assist in resolving the question before this Court.

a. In discussing "[t]he requirements of due process" (Resp. Br. 27), respondent summarizes several decisions of this Court in which criminal defendants challenged the way in which a State allocated the burden of proof at trial on a particular fact (*id.* at 27-29). As discussed in our opening brief, those decisions are inapposite, for they involved factual elements of crimes, not questions of law. U.S. Br. 38-39 & n.27. In any event, respondent relies on the decisions only to argue that it cannot be harmless error for a court to take from the jury an issue that the jury is constitutionally required to decide. Resp. Br. 29 & n.15. The harmless-error issue, however, is not before this Court.

b. Respondent's discussion of the constitutional right to a jury trial in a criminal case likewise is tangential to analysis of the question presented here. See Resp. Br. 30-34. He begins (*id.* at 30-31) by establishing "the interrelationship between the due

process reasonable doubt requirement and the Sixth Amendment right to have a jury decide every fact necessary for conviction" (*id.* at 31). We acknowledge that connection in our opening brief. U.S. Br. 36-37. Respondent ends (Resp. Br. 32-34) by repeating his harmless-error argument.

c. Finally, respondent argues (Resp. Br. 34-39), in accordance with the Ninth Circuit's reasoning (Pet. App. 10a-14a), that materiality must be determined by the jury because it is an element of the offense prescribed in Section 1001. Resp. Br. 34-35. Respondent appears to base that argument in part on what he regards to have been Congress's intent in enacting Section 1001. See, *e.g.*, Resp. Br. 39 ("the power of the legislature is not the issue; it is how that power was exercised which determines whether the jury must decide the issue").[4] As we explain in our opening brief, however, there is no evidence that Congress

---

[4] See also Resp. Br. 36 (it is "strictly the domain of Congress to determine and define the essential elements of any criminal offense"), 37 ("[a]pplying the same principles of statutory interpretation" as applied in *United States* v. *Rodgers*, 466 U.S. 475 (1984), " 'materiality' can readily be interpreted and understood by jurors"), Resp. Br. 37 ("where Congress has designated materiality to be an essential element of an offense, as it has with false statement prosecutions brought pursuant to 18 U.S.C. § 1001, then the distinction between issues of fact and law have little relevance to the determination whether the element must be decided by the jury"), 38 ("What the Government fails to acknowledge is that Congress *did* include materiality in the false statement statute, making it an essential element that must therefore be submitted to the jury."), 43 ("Congress has expressed its view that materiality is an essential element of the false statement statute, and should not be prohibited from doing so by reliance on common law traditions incorporated through the *Sinclair* dictum.").

intended in Section 1001 to depart from the widespread and virtually unquestioned common law treatment of materiality in perjury prosecutions as an issue of law for resolution by the courts. See U.S. Br. 24. In the absence of such evidence, Congress is presumed to have adopted that tradition as part of the "cluster of ideas" surrounding the concept of materiality in analogous state and federal statutes. See *Morissette* v. *United States*, 342 U.S. 246, 263 (1952).

Respondent appears to argue that, regardless of congressional intent, the Constitution requires the jury to decide every issue on which liability for an offense depends. See Resp. Br. 34 ("[w]henever an issue is an essential element of a criminal offense, constitutional principles of due process and the right to a jury trial must take precedence"). Even the Ninth Circuit did not embrace so broad a position. On the contrary, it recognized that an element of a crime may permissibly be decided by the judge "as a matter of law * * * if the determination had no factual component at all." Pet. App. 12a.[5] While the

---

[5] The Ninth Circuit has in fact resolved elements of crimes as a matter of law, even when the appraisal of facts did enter into the decision. See *United States* v. *Warren*, 984 F.2d 325, 327 (9th Cir. 1993) (district court "may determine as a matter of law the existence of federal jurisdiction over [a] geographic area"; jury determines where crime was actually committed); *United States* v. *Jackson*, 436 F.2d 39 (9th Cir. 1970) (determining as a matter of law whether a radio purchased with government funds and used in a federally subsidized club was "property of the United States" under federal stolen property statute), cert. denied, 403 U.S. 906 (1971). Other circuits follow the same approach. See, *e.g.*, *United States* v. *Hernandez-Fundora*, No. 93-1632, 1995 WL 62811 (2d Cir. Feb. 14, 1995) (whether a particular place is within the special

Constitution entitles a criminal defendant to have the jury decide the factual components of the elements of the offense with which he is charged, see U.S. Br. 33, the determination of whether a statement was "predictably capable of affecting * * * the official decision," *Kungys*, 485 U.S. at 771, is not a factual issue.

4. a. In our opening brief, we argue that the history of assigning materiality in perjury cases to the judge, rather than the jury, strongly supports its constitutionality. U.S. Br. 26-31. We explained that history is relevant in reviewing both due process challenges and challenges based on the constitutional right to a jury trial in a criminal case. *Ibid.*

Respondent observes that historical endorsement of a practice does not immunize it from due process review. See Resp. Br. 43-44; see also NACDL Amicus Br. 9-10. We agree. U.S. Br. 27. In our opening brief, however, we also show that the assignment of materiality to the jury does not offend the principle of due process articulated in *In re Winship*, 397 U.S. 358 (1970) (see U.S. Br. 31-40), or any other "recognized principle of 'fundamental fairness'" (*id.* at 40 (quoting *Medina* v. *California*, 112 S. Ct. 2572, 2578 (1992)). Respondent argues that "fundamental fairness" analysis is "primarily utilized with federal challenges to state procedures" (Resp. Br. 43), and he

---

territorial jurisdiction of the United States is a question of law); *United States* v. *Howard*, 855 F.2d 832, 834 (11th Cir. 1988) (whether funds received by the defendant were reportable income in a tax prosecution is a question of law); *United States* v. *Guy*, 456 F.2d 1157, 1163 (8th Cir.) (whether Federal Reserve notes are "obligations of the United States" in a counterfeiting prosecution is a question of law), cert. denied, 409 U.S. 896 (1972).

suggests that it is "of questionable relevance" here (*id.* at 44 n.21). This Court, however, has undertaken that analysis in reviewing due process challenges to federal, as well as state, criminal procedures. See, *e.g.*, *Dowling* v. *United States*, 493 U.S. 342, 352-353 (1990) (admission of evidence at trial); *United States* v. *Lovasco*, 431 U.S. 783, 790 (1977) (preindictment delay).

Respondent errs in arguing that history has little bearing on whether a practice comports with the Constitution's jury trial guarantee. See Resp. Br. 40-43, 45. In support of that argument, respondent relies on *Williams* v. *Florida*, 399 U.S. 78 (1970), which upheld a state rule authorizing juries of fewer than 12 people in noncapital criminal trials. *Williams* makes clear that the Constitution does not require "every feature of the [criminal] jury as it existed at common law." *Id.* at 91. *Williams* does not address the quite different issue of under what circumstances the Constitution invalidates a common law feature of a jury. Elsewhere, this Court has indicated that the Constitution may require that a common law feature of a jury yield to changes in society's concept of the community, which the jury is designed to reflect. See *J.E.B.* v. *Alabama*, 114 S. Ct. 1419, 1426 (1994) (equal protection bars gender discrimination in use of peremptory challenges); *Taylor* v. *Louisiana*, 419 U.S. 522, 530 (1975) (Sixth Amendment bars exclusion of women from jury). There has been no such change, however, in the customary view of materiality. See U.S. Br. 29-30; *e.g.*, *State* v. *Sands*, 467 A.2d at 215-216.

b. Respondent argues that "*Sinclair*'s foundation no longer rests on solid ground" because "this Court's interpretation of the right to a jury trial has

not remained static since * * * *Sinclair* was decided." Resp. Br. 45, 47; see also NACDL Amicus Br. 6-7. In holding that "pertinency" was properly determined by the judge rather than the jury, the Court in *Sinclair* reasoned that pertinency was analogous to two other sorts of determinations: a determination "concerning relevancy at the trial of issues in court," which the Court noted is "uniformly held * * * a question of law"; and a determination "as to materiality of false testimony charged as perjury," which also "is one for the court." 279 U.S. at 298, discussed in U.S. Br. 13. Now, as when *Sinclair* was decided, courts (not juries) determine whether evidence is relevant for purposes of admission at trial. See U.S. Br. 43 & n.30; see also *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2796 & n.10 (1993). Similarly, courts continue to determine the materiality of allegedly perjured testimony; indeed, materiality determinations are made by the court, rather than the jury, in prosecutions for other offenses, besides perjury, involving false statements to public entities. See U.S. Br. 22 n.15, 30 n.22. Thus, the foundation of *Sinclair* is solid.

It does not matter that, after *Sinclair*, the Court addressed many other issues concerning a criminal defendant's right to a jury trial, such as whether the right attaches in state proceedings. See Resp. Br. 47 (citing, *inter alia*, *Duncan* v. *Louisiana*, 391 U.S. 145 (1968)). The only aspect of the right at issue here is a criminal defendant's entitlement to have the jury find every fact necessary to constitute the charged offense. See, *e.g.*, Resp. Br. 4, 27; Pet. App. 6a-9a. That principle was well-established when *Sinclair* was decided, as we explain in our opening brief (see

U.S. Br. 33-35), and it has remained constant, see *Sullivan* v. *Louisiana*, 113 S. Ct. 2078, 2080 (1993). Indeed, the defendant in *Sinclair* invoked that principle unsuccessfully in arguing that "pertinency" under the statute at issue had to be determined by the jury. See U.S. Br. 34-35; see also *Taylor*, 693 F. Supp. at 838 n.21. Respondent himself states that the principle is "as old as the concept of the jury trial itself." Resp. Br. 40.[6]

---

[6] Having held that pertinency is properly determined by the court, rather than the jury, the Court in *Sinclair* stated that a contrary holding "would be incongruous and contrary to well-established principles." 279 U.S. at 299. In connection with that statement, the Court cited (*ibid.*) *ICC* v. *Brimson*, 154 U.S. 447, 489 (1894), and *Horning* v. *District of Columbia*, 254 U.S. 135 (1920). Although respondent suggests (Resp. Br. 45-46) that parts of *Brimson* and *Horning* are no longer good law, he does not challenge the propositions for which the Court apparently cited those decisions in *Sinclair*. In *Brimson*, the Court determined that a duty to comply with an ICC subpoena depended in part on whether "the testimony sought, and the books, papers, etc., called for, relate to the matter under investigation." 154 U.S. at 476. The Court went on to hold that the existence of such a duty "is manifestly not one for the determination of a jury" because it "is not one of fact, but of law exclusively." *Id.* at 488. Because of the similarity between the issue whether material sought by an ICC subpoena "relate[d] to the matter under investigation" by the ICC and the issue whether the question posed by a congressional committee was "pertinent" to the matter under investigation by the committee, the holding in *Brimson* that the former issue was one of law to be determined by the court supported the holding in *Sinclair* that the latter issue was likewise one of law to be determined by the court.

In *Horning*, the Court affirmed a criminal conviction despite the trial court's "regrettable peremptoriness of tone" in suggesting to the jury that it should return a guilty verdict. 254 U.S. at 138. Although respondent suggests (Resp. Br. 46-

c. Although respondent recognizes at one point that the principle on which he relies here long predated *Sinclair*, elsewhere he repeats the Ninth Circuit's mistake by treating the principle as originating in *In re Winship*, *supra*. See Resp. Br. 4, 47-48. Based on that error, he criticizes the lower courts for following *Sinclair* while "mak[ing] no mention of *Winship*." Resp. Br. 48. Because the principle that respondent attributes to *Winship* was already well-established when *Sinclair* was decided and was specifically raised in *Sinclair*, however, the lower federal courts have correctly determined that they are bound by *Sinclair*, especially in light of its reaffirmance in *Kungys*. See *United States* v. *Daily*, 921 F.2d 994, 1005-1006 & n.14 (10th Cir. 1990), cert. denied, 502 U.S. 952 (1991); see also *United States* v. *Paxson*, 861 F.2d 730, 732 (D.C. Cir. 1988); *United States* v. *Abadi*, 706 F.2d 178, 180 n.2 (6th Cir.), cert. denied, 464 U.S. 821 (1983).

---

47) that *Horning* is no longer good law in light of later decisions stating that a trial court judge cannot direct a guilty verdict, Justice Holmes' opinion for the Court in *Horning* itself recognized that principle, but simply held that the trial court's suasion was not tantamount to a directed verdict. In any event, the Court in *Sinclair* presumably cited *Horning* for the unexceptionable statement that "the judge always has the right and duty to tell [the jury] what the law is upon this or that state of facts." *Horning*, 254 U.S. at 138.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

APRIL 1995

Supreme Court, U.S.
FILED
FEB 16 1995
OFFICE OF THE CLERK

(4)

No. 94-514

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA,

Petitioner,

vs.

MICHAEL E. GAUDIN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

KENT S. SCHEIDEGGER*
CHARLES L. HOBSON
STEPHANIE J. FINELLI
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
Telephone: (916) 446-0345

Attorney for Amicus Curiae Criminal Justice Legal Foundation

*Attorney of Record

BEST AVAILABLE COPY

27pp

QUESTION PRESENTED

Have recent developments in constitutional case law abrogated the traditional rule that the judge and not the jury determines whether a false statement was material?

TABLE OF CONTENTS

Question presented i

Table of authorities v

Interest of *amicus curiae* 1

Summary of facts and case 2

Summary of argument 2

Argument 3

I

Uncontrolled extrapolation of constitutional rules is a great danger, and it requires great caution 3

II

Winship is premised on tradition and should be limited to tradition 5

A. Tradition and *Winship* 5

B. *Mullaney* and *Patterson* 7

C. The presumption cases 10

D. Holding the line 11

E. The boundary of *Winship* 12

III

The Sixth Amendment should not be extended to strike down traditional practice without exceptionally compelling justification, not present here 13

A. Traditional practice and the Sixth Amendment . . 13

B. *Sullivan* v. *Louisiana* 15

C. *Sinclair* as precedent 16

Conclusion 18

TABLE OF AUTHORITIES

Cases

Arizona v. Roberson, 486 U. S. 675, 100 L. Ed. 2d 704, 108 S. Ct. 2093 (1988) 4

Bloom v. Illinois, 391 U. S. 194, 20 L. Ed. 2d 522, 88 S. Ct. 1477 (1968) 14

Bushell's Case, 124 Eng. Rep. 1006 (CP 1670) 14

Cabana v. Bullock, 474 U. S. 376, 88 L. Ed. 2d 704, 106 S. Ct. 689 (1986) 16

Cage v. Louisiana, 498 U. S. 39, 112 L. Ed. 2d 339, 111 S. Ct. 328 (1990) 12

Carroll v. United States, 16 F. 2d 951 (CA2 1927) 13

Carter v. Illinois, 329 U. S. 173, 91 L. Ed. 172, 67 S. Ct. 216 (1946) 4

Church of Lukumi Babalu Aye v. Hialeah, 124 L. Ed. 2d 472, 113 S. Ct. 2217 (1993) 9

Cohens v. Virginia, 6 Wheat. (19 U. S.) 264, 5 L. Ed. 257 (1821) 17

Cupp v. Naughten, 414 U. S. 141, 38 L. Ed. 2d 368, 94 S. Ct. 396 (1973) 6

Davis v. United States, 160 U. S. 469, 40 L. Ed. 499, 16 S. Ct. 353 (1895) 6

Duncan v. Louisiana, 391 U. S. 145, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968) 15

Edwards v. Arizona, 451 U. S. 477, 68 L. Ed. 2d 378, 101 S. Ct. 1880 (1981) 3

Ex parte Quirin, 317 U. S. 1, 87 L. Ed. 3, 63 S. Ct. 2 (1942) 13

Francis v. Franklin, 471 U. S. 307, 85 L. Ed. 2d 344, 105 S. Ct. 1965 (1985) 10

Holland v. Illinois, 493 U. S. 474, 107 L. Ed. 2d 905,
110 S. Ct. 803 (1990) 14

Hudson Water Co. v. McCarter, 209 U. S. 349,
52 L. Ed. 828, 28 S. Ct. 529 (1908) 3

Hurtado v. California, 110 U. S. 516, 28 L. Ed. 232,
4 S. Ct. 111 (1884) 6

In re Gault, 387 U. S. 1, 18 L. Ed. 2d 527,
87 S. Ct. 1428 (1967) 6

In re Winship, 397 U. S. 358, 25 L. Ed. 2d 368,
90 S. Ct. 1068 (1970) 5, 6, 7, 17

Kokkonen v. Guardian Life Ins. Co. of America,
128 L. Ed. 2d 391, 114 S. Ct. 1673 (1994) 17

Leland v. Oregon, 343 U. S. 790, 96 L. Ed. 1302,
72 S. Ct. 1002 (1952) 9

Luse v. United States, 49 F. 2d 241 (CA9 1931) 13

Mapp v. Ohio, 367 U. S. 643, 6 L. Ed. 2d 1081,
81 S. Ct. 1684 (1961) 3

Martin v. Ohio, 480 U. S. 228, 94 L. Ed. 2d 267,
107 S. Ct. 1098 (1987) 11

McKeiver v. Pennsylvania, 403 U. S. 528, 29 L. Ed. 2d 647,
91 S. Ct. 1976 (1971) 15

McMillan v. Pennsylvania, 477 U. S. 79, 91 L. Ed. 2d 67,
106 S. Ct. 2411 (1986) 11, 12, 13

Medina v. California, 120 L. Ed. 2d 353,
112 S. Ct. 2572 (1992) 12

Mullaney v. Wilbur, 421 U. S. 684, 44 L. Ed. 2d 508,
95 S. Ct. 1881 (1975) 7, 8, 11

Pacific Mutual Life Ins. Co. v. Haslip, 499 U. S. 1,
113 L. Ed. 2d 1, 111 S. Ct. 1032 (1991) 12

Parklane Hosiery Co. v. Shore, 439 U. S. 322,
58 L. Ed. 2d 552, 99 S. Ct. 645 (1979) 13

Patterson v. New York, 432 U. S. 197, 53 L. Ed. 2d 281, 97 S. Ct. 2319 (1977) 8, 9, 10

People v. Cahan, 44 Cal. 2d 434, 282 P. 2d 905 (1955) . . . 3

People v. Frye, 7 Cal. App. 4th 1148, 10 Cal. Rptr. 2d 217 (1992) 7

People v. Threewit, 96 N. E. 242 (Ill. 1911) 13

Pope v. Illinois, 481 U. S. 497, 95 L. Ed. 2d 439, 107 S. Ct. 1918 (1987) 17

Sandstrom v. Montana, 442 U. S. 510, 61 L. Ed. 2d 39, 99 S. Ct. 2450 (1979) 10

Schad v. Arizona, 501 U. S. 624, 115 L. Ed. 2d 555, 111 S. Ct. 2491 (1991) 12

Schick v. United States, 195 U. S. 65, 49 L. Ed. 99, 24 S. Ct. 826 (1904) 14

Sinclair v. United States, 279 U. S. 263, 73 L. Ed. 692, 49 S. Ct. 268 (1929) 16

Snyder v. Massachusetts, 291 U. S. 97, 78 L. Ed. 674, 54 S. Ct. 330 (1934) 6

Sparf v. United States, 156 U. S. 51, 39 L. Ed. 343, 15 S. Ct. 273 (1895) 13

Spencer v. Texas, 385 U. S. 554, 17 L. Ed. 2d 606, 87 S. Ct. 648 (1967) 6, 8

State v. Dineen, 102 S. W. 480 (Mo. 1907) 13

Sullivan v. Louisiana, 124 L. Ed. 2d 182, 113 S. Ct. 2078 (1993) 15, 16

Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd., 460 U. S. 533, 75 L. Ed. 2d 260, 103 S. Ct. 1343 (1983) . . 16

Tumey v. Ohio, 273 U. S. 510, 71 L. Ed. 749, 47 S. Ct. 437 (1927) 14

United States v. Singleton, 54 F. 488 (DC Ala. 1892) . . . 13

United States v. 12 200-Ft. Reels of Film, 413 U. S. 123, 37 L. Ed. 2d 500, 93 S. Ct. 2665 (1973) 4

Victor v. Nebraska, 127 L. Ed. 2d 583, 114 S. Ct. 1239 (1994) 11, 12

Woodruff v. Parham, 8 Wall. (75 U. S.) 123, 19 L. Ed. 382 (1869) 16

Yates v. Evatt, 500 U. S. 391, 114 L. Ed. 2d 432, 111 S. Ct. 1884 (1991) 10

Statutes

U. S. Const., Amdt. 5 5

U. S. Const., Amdt. 14, § 1 6

U. S. Const., Art. III, § 2, cl. 3 17

Treatise

4 W. Blackstone, Commentaries (1st ed. 1769) 9, 14

Miscellaneous

Advisory Committee Note to Federal Rule of Criminal Procedure 42(b) 14

Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142 (1970) . . . 4

L. Hand, The Bill of Rights (1958) 4

1 T. Heath, A History of Greek Mathematics (1981 reprint of 1921 ed.) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA,

Petitioner,

vs.

MICHAEL E. GAUDIN,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In the present case, the Court of Appeals held that a long-standing practice expressly approved by this Court is in conflict with constitutional requirements, even though the practice has coexisted with the underlying principles for well over a century. This creeping constitutionalization of criminal procedure, overturning settled practice with little regard for the

---

1. Both parties have consented in writing to the filing of this brief.

consequences, is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Respondent Michael Gaudin was convicted in federal court of equity skimming and making false statements on HUD loan documents. A panel of the Ninth Circuit overturned the false statement conviction on the ground that the trial judge failed to submit to the jury the question of whether those statements were material. *United States* v. *Gaudin*, 997 F. 2d 1267, 1273 (CA9 1993). The Ninth Circuit granted rehearing en banc, 5 F. 3d 374 (1993), and the en banc court came to the same decision. 28 F. 3d 943 (1994).

SUMMARY OF ARGUMENT

This is a case of uncontrolled extrapolation of constitutional rules far beyond the text and history of the Constitution. Such extrapolation, if not curbed, will eventually withdraw the entire field of criminal procedure from democratic control. This area of jurisprudence is in dire need of limiting principles.

One such principle is that a constitutional rule founded on tradition is bounded by tradition. The rule of *In re Winship*, that guilt must be proved beyond a reasonable doubt, is a constitutional rule *because* it is a traditional rule. Any practice that traditionally coexisted with that rule, therefore, does not violate it.

A second limiting principle is that the constitutional right to jury trial is the common law right, and no more. Although an exception was made in *Bloom* v. *Illinois*, regarding criminal contempt, the making of an exception requires particularly compelling circumstances, which are not present in this case.

Sinclair v. *United States*, remains a valid precedent. None of the cases cited by the Court of Appeals to question its validity dealt with the issue of whether the judge or jury decides particular issues at trial. The subsequent extension to the states of

certain rules that have always governed federal trials does not impair a precedent established in a federal case.

ARGUMENT

On the surface, this case is about a seemingly minor question of procedure. Will the materiality of false statements be decided by judges or juries? On a deeper level, though, this case is about much more. It is about the creeping constitutionalization of criminal procedure. It is about courts extrapolating rules from rules from rules further and further away from the text and history of the Constitution. Most disturbing of all, it is about courts doing these things without apparent awareness of the magnitude of what they are doing.

I. Uncontrolled extrapolation of constitutional rules is a great danger, and it requires great caution.

"All rights tend to declare themselves absolute to their logical extreme." *Hudson Water Co.* v. *McCarter*, 209 U. S. 349, 355 (1908) (Holmes, J.). Just as uncontrolled growth of judicially created property and contract rights was a threat to democracy in Justice Holmes' day, so in modern times has uncontrolled growth of constitutionalized criminal procedure rights threatened the people's right of self-government.

Judicial seizure of decisions of policy formerly thought to belong to the people has occasionally come in dramatic leaps. Compare *Mapp* v. *Ohio*, 367 U. S. 643, 655 (1961) (constitutional mandate) with *People* v. *Cahan*, 44 Cal. 2d 434, 442, 282 P. 2d 905, 910 (1955) ("judicially declared rule of evidence," hence subject to legislative revision). More often, though, the shift has come in increments. The process has been one of erosion rather than mudslide.

The process typically begins with a constitutional principle which nearly everyone agrees is good policy, although some may doubt whether it is in the Constitution. Then further steps are said to "follow" from the principle, or to be necessary to "protect" it, or to prevent its "evasion." See, *e.g.*, *Edwards* v. *Arizona*, 451 U. S. 477, 485 (1981) (questioning cut-off rule

lends substance to *Miranda*); *Arizona* v. *Roberson*, 486 U. S. 675, 684 (1988) (extension of *Edwards* to unrelated crimes "follows"); but see *id.*, at 688 (Kennedy, J., dissenting) (consider practical realities).

As far back as 1970, Judge Henry Friendly warned that the ballooning case law had already become "a detailed Code of Criminal Procedure, to which a new chapter is added every year." Friendly, Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments, 38 U. Chi. L. Rev. 142, 156; cf. *Carter* v. *Illinois*, 329 U. S. 173, 175 (1946). Many, many chapters have been added since then, often by successive extrapolation. The danger of such extrapolation has not entirely escaped the notice of this Court:

> "The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth 'logical' extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance." *United States* v. *12 200-Ft. Reels of Film*, 413 U. S. 123, 127 (1973) (footnote omitted).

The Greek mathematician Euclid derived all of geometry from only five postulates. See 1 T. Heath, A History of Greek Mathematics 374 (1981 reprint of 1921 ed.). If the judiciary continues to expand constitutional doctrine into every nook where existing rules could logically lead, then it could similarly derive from the Bill of Rights a complete, comprehensive code, leaving nothing for the people to decide for themselves.

The code so derived might very well be an excellent code, better than any now in force in the states. But the process of democracy is often more important than the result. Having a say in the enactment of laws is an essential part of citizenship. See L. Hand, The Bill of Rights 58 (1958). The progressive decline of democratic control over criminal procedure, as constitutional doctrine crowds out more and more of the field, is a genuine loss to the citizens of this country, regardless of how desirable the rules themselves may be.

This expansion is typically framed by those who favor it as the expansion of the rights of the individual against the govern-

ment. Yet it is equally true that every step in the expansion is a diminution in another essential right: the right of self-government. With each step this Court, a government entity, deprives the individual voter of another piece of that precious right.

> "Any legislature presumably passes a law because it thinks the end result will help more than hinder and will thus further the liberty of the society as a whole. ' The people, through their elected representatives, may of course be wrong in making those determinations, but the right of self-government that our Constitution preserves is just as important as any of the specific individual freedoms preserved in the Bill of Rights. The liberty of government by the people, in my opinion, should never be denied by this Court except when the decision of the people as stated in laws passed by their chosen representatives, conflicts with the express or necessarily implied commands of our Constitution." *In re Winship*, 397 U. S. 358, 385 (1970) (Black, J., dissenting).

The present case does not involve an express legislative choice that elements of offenses traditionally considered to be questions of law would continue to be decided by the trial judge. However, the constitutional basis of the Ninth Circuit's rule would forever take that decision away from both Congress and the state legislatures and vest it instead in an unelected, unaccountable judiciary. Any such diminution in the right of self-government ought to be regarded as a drastic measure requiring compelling justification. The mere fact that the conclusion may seem to follow logically from a statement in a prior case is not enough.

II. *Winship* is premised on tradition and should be limited to tradition.

A. Tradition and Winship.

The rule of *In re Winship*, 397 U. S. 358 (1970) is not based on any of the specific requirements of the Bill of Rights. Instead, it comes under the general requirement of "due process," *id.*, at 364, which the Constitution imposes in identical terms on both the federal and state governments. U. S. Const.,

Amdt. 5; *id.* Amdt. 14, § 1. For this general requirement, Justice Cardozo's classic statement holds true today:

> "The [government] is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice *so rooted in the traditions* and conscience of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934) (emphasis added).

There is no significant disagreement that guilt of a crime ought to be proved beyond a reasonable doubt. Indeed, the universality of that agreement was precisely the reason that the constitutional question did not arise for so many years. See *Winship*, 397 U. S., at 372 (Harlan, J., concurring). But agreement alone does not make a constitutional mandate. *Cupp* v. *Naughten*, 414 U. S. 141, 146 (1973). There must be something more. For the *Winship* rule, that something more is tradition.

The *Winship* opinion notes the deep roots of the reasonable doubt standard "from our early years as a Nation." 397 U. S., at 361. The requirement had been assumed to be implicit in constitutional guarantees as far back as 1895. See *id.*, at 362, citing *Davis* v. *United States*, 160 U. S. 469, 488 (1895).

Winship also notes policy reasons for the reasonable doubt standard. 397 U. S., at 363-364. But policy alone, like universal agreement, is no basis for removing an issue from the democratic process. *Spencer* v. *Texas*, 385 U. S. 554, 567-568 (1967). The strong connection between the reasonable doubt standard and preventing the conviction of innocent people serves to distinguish this traditional practice from other traditions which have no such connection and may be abandoned. See, *e.g.*, *Hurtado* v. *California*, 110 U. S. 516, 538, (1884) (state may replace grand jury with preliminary hearing). Tradition remains the foundation for *Winship*'s elevation of the reasonable doubt standard to constitutional stature.

In *Winship* the Court addressed the constitutionality of a variation on the burden of proof unknown to the common law. The use of juvenile court to deal with children who had committed crimes was a turn-of-the-century innovation. See *In re Gault*, 387 U. S. 1, 14-15 (1967). Although the basic approach

of juvenile courts replacing criminal procedures was widely agreed upon, *ibid.*, the burden of proof was not. Courts and legislatures were deeply divided. See *Winship*, 397 U. S., at 360, n. 3 and authorities cited.

Winship thus stands for the proposition that a rule deeply rooted in our tradition and necessary to prevent miscarriages of justice can be a part of the constitutional requirement of due process. Hence, the power of judicial review may restrain legislative innovation which is contrary to tradition. But can a rule founded on tradition be used to chop down tradition as well as conserve it? Can it be used to force change on a state which chooses to retain a traditional practice? The course after *Winship* has been neither straight nor smooth.

B. Mullaney and Patterson.

The *Winship* rule appeared to be cut loose from its historical moorings in *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975). Under Maine law, murder and manslaughter were degrees of the single offense of felonious homicide. The difference between the two degrees was malice. For a hundred years, that element had been presumed upon proof of an intentional killing; defendant had the burden of negating malice by proving "heat of passion on sudden provocation in order to reduce murder to manslaughter." *Id.*, at 688.

Traditional practice in both England and America clearly supported placing some burden on the defendant, although it was not clear whether the general rule was a burden of persuasion or merely a burden of producing evidence. *Id.*, at 693-695, and nn. 16, 20. Imposing the latter burden on the defendant remains common practice to this day. See *id.*, at 701, n. 28; *People* v. *Frye*, 7 Cal. App. 4th 1148, 1154-1155, 10 Cal. Rptr. 2d 217, 220 (1992).

The *Mullaney* Court concluded its historical discussion with two points: that heat of passion was traditionally the main factor determining the degree of homicide, and that the "clear trend" was toward placing the ultimate burden of persuasion on the prosecution. 421 U. S., at 696. Both of these are true, but neither answers the *Winship* question: whether the rule in

question is contrary to the *traditional* burden of proof constitutionalized in *Winship*.

The remainder of the *Mullaney* opinion consists of policy discussion. It discusses the consequences of a finding against the defendant, *id.*, at 698, "societal interests in the reliability of jury verdicts," *id.*, at 699, and difficulties of proof. *Id.*, at 701-702. The Court worried that states might "undermine" *Winship* by redefining separate crimes as degrees of a single offense. *Id.*, at 698. The question of whether Maine had transgressed the tradition which *Winship* found was part of "due process" was not again mentioned.

If *Mullaney* were the last word, one could readily conclude that *Winship* had been entirely detached from the tradition that gave it birth and had become a free-floating principle, a "roving commission" for this Court to reweigh the costs and benefits of assignment of burdens of proof in criminal cases. Cf. *Spencer* v. *Texas*, 385 U. S. 554, 569 (1967) (Stewart, J., concurring). However, a partial correction was not long in coming.

Patterson v. *New York*, 432 U. S. 197 (1977) involved a modern homicide statute which had abandoned the confusing common-law concept of "malice." Instead, intentional killing was defined to be second-degree murder, subject to an affirmative defense of "extreme emotional disturbance." *Id.*, at 198. That defense was only partial, however, because an intentional killer who established it was still guilty of manslaughter. *Id.*, at 199. The burden of proving the defense was on the defendant, by the preponderance of the evidence. *Id.*, at 200.

There were two differences between the New York statute in *Patterson* and the Maine law in *Mullaney*, one practical and one of form. The practical difference, which the Court deemed "relevant to note" was that the New York statutory defense was much broader than the Maine common law concept. *Id.*, at 202. The other difference was that the disturbed mental state was structured as an affirmative defense rather than negating an element of the offense.

If the Court had simply followed the same logical path as *Mullaney*, neither of these differences would have mattered. Indeed, as noted above, the manner in which a state structures the offense was specifically rejected as a criterion by the

Mullaney Court. The fact that a defense is broader than the traditional one makes only a political difference. Permitting states to place the burden on the defendant lowers the political barriers to the creation of new and broader defenses. See *id.*, at 209, and n. 11.

Patterson, however, was not seeking to take advantage of the broader defense. He claimed the quintessential common-law manslaughter. Compare *id.*, at 198 with 4 W. Blackstone, Commentaries 191-192 (1st ed. 1769) (adultery, caught in the act). It would be a curious interpretation of the Constitution to permit a state to raise the burden of proof on a person who falls squarely within the traditional defense, merely in order to extend that defense to other people who would not have qualified for it. Other factors were necessary to the *Patterson* decision.

Foremost among these factors was that following the rationale of *Mullaney* to its logical conclusion would have resulted in a head-on collision with another precedent: *Leland* v. *Oregon*, 343 U. S. 790, 799 (1952) (state may place burden of proving insanity on defendant); see *Patterson*, 432 U. S., at 204-205. The question presented, then, was "not the usual question of whether to follow a constitutional rule, but the question of which constitutional rule to follow . . . ." *Church of Lukumi Babalu Aye* v. *Hialeah*, 124 L. Ed. 2d 472, 517, 113 S. Ct. 2217, 2248 (1993) (Souter, J., concurring in part).

In refusing to extend *Mullaney* to overrule *Leland*, the *Patterson* Court turned back to tradition.

> "It is said that the common-law rule permits a State to punish one as a murderer when it is as likely as not that he acted in the heat of passion or under severe emotional distress and when, if he did, he is guilty only of manslaughter. *But this has always been the case in those jurisdictions adhering to the traditional rule.*" 432 U. S., at 208-209 (emphasis added).

Patterson did not need to overrule the specific holding of *Mullaney*, and it did not do so. *Id.*, at 210. Yet the rationale of *Patterson* left *Mullaney* as little more than a shell, a holding without a rationale. According to the dissent, the majority's "explanation of the *Mullaney* holding bears little resemblance to the basic rationale of that decision." *Id.*, at 222-223 (opinion of

Powell, J.). That is quite true, but it is equally true of *Mullaney*'s complete disregard of tradition as the basis for the *Winship* rule.

C. The Presumption Cases.

Rather than overrule *Mullaney*, *Patterson* distinguished it on the basis of the use of a presumption in that case. *Patterson*, 432 U. S., at 216; cf. *id.*, at 221-222 (Powell, J., dissenting) (criticizing that basis for distinguishing). This disapproval of presumptions of elements soon took on a life of its own, separated from both the tradition basis of *Winship* and the rejected rationale of *Mullaney*.

Sandstrom v. *Montana*, 442 U. S. 510, 513, 524 (1979) disapproved the traditional presumption that a person intends the natural consequences of his voluntary acts. Conspicuous by its absence from the opinion is any discussion of the tradition of this presumption in American courts generally. The only significant historical discussion is of this Court's own cases. See *id.*, at 519, n. 9.[2] Subsequent cases simply relied on *Sandstrom*, without looking further back. See *Francis* v. *Franklin*, 471 U. S. 307, 313-318 (1985); *Yates* v. *Evatt*, 500 U. S. 391, 400-402 (1991).

Thus *Mullaney*, as narrowed by *Patterson* and then amplified within that narrowed channel by *Sandstrom*, has used a rule grounded in tradition to exterminate a traditional practice. The damage in states which used the presumption as a standard jury instruction was enormous, but the wreckage is behind us. The instruction books have been purged, and the cases in which those instructions had been used are resolved.

Regardless of whether the *Sandstrom* rule was really required by the Constitution, the change has been made, it is a desirable one as a matter of policy, and there will be no further damage *if* the constitutional rule is not further extended.

---

2. Even this limited discussion was inadequate, for reasons we have previously briefed in this Court. See Brief for the Criminal Justice Legal Foundation as *Amicus Curiae* in *Yates* v. *Evatt*, O. T. 1990, No. 89-7691, pp. 7-9, but the point need not be rehashed here.

D. Holding the Line.

Other than the presumption cases, the decisions of this Court since *Winship* have consistently refused to extend that decision to strike down traditional practices. Although a *per se* rule has not been adopted, the results are consistent with such a rule.

Patterson and the importance of tradition were reaffirmed in *Martin* v. *Ohio*, 480 U. S. 228 (1987).

> "As we noted in *Patterson*, the common-law rule was that affirmative defenses, including self-defense, were matters for the defendant to prove. 'This was the rule when the Fifth Amendment was adopted, *and it was the American rule when the Fourteenth Amendment was ratified.*' [Citation.] Indeed, well into this century, a number of States followed the common-law rule and required a defendant to shoulder the burden of proving that he acted in self-defense." *Id.*, at 235 (emphasis added).

Even though the clear trend was to the contrary, Ohio did not violate the Fourteenth Amendment by choosing to adhere to the practice that was standard when that Amendment was adopted. Compare *id.*, at 236 with *Mullaney*, *supra*, 421 U. S., at 696.

McMillan v. *Pennsylvania*, 477 U. S. 79 (1986) similarly looked to traditional practice. In that case, the legislature had prescribed a mandatory minimum sentence for armed criminals, without increasing the maximum sentence for the crime. Only a preponderance of the evidence was needed for the firearm finding. *Id.*, at 81-82.

Rejecting the *Winship*/*Mullaney* claim, the Court noted that sentencing judges "have traditionally heard evidence and found facts without any prescribed burden of proof at all." *Id.*, at 91. The fact that the legislature prescribed a sentence choice from a fact, rather than leaving the impact of that fact discretionary, made no constitutional difference.

Finally, in *Victor* v. *Nebraska*, 127 L. Ed. 2d 583, 114 S. Ct. 1239 (1994) this Court upheld the traditional definition of reasonable doubt, derived from an 1850 Massachusetts case. See *id.*, at 592, 114 S. Ct., at 1244. The constitutionality of the traditional definition as originally understood was beyond question. The only difficulty was the impact of changes in the

English language on the jurors' understanding of the definition. See *id.*, at 597, 114 S. Ct., at 1248; *id.*, at 601, 114 S. Ct., at 1251 (Kennedy, J., concurring). In contrast, a definition that deviated markedly from the traditional one was summarily struck down in *Cage* v. *Louisiana*, 498 U. S. 39, 41 (1990) (*per curiam*).

E. The Boundary of Winship.

Justice Scalia has advanced the thesis that tradition alone is sufficient to insulate a traditional practice from a general "due process" attack, as opposed to an attack based on a specific requirement of the Bill of Rights or the Equal Protection Clause. See *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U. S. 1, 25, 38 (1991) (opinion concurring in the judgment). This *per se* rule has not yet gained the support of a majority, although the traditional practice carries great weight and nearly always prevails. See *id.*, at 17-18 (majority); *id.*, at 40 (Kennedy, J., concurring in the judgment); *Schad* v. *Arizona*, 501 U. S. 624, 642-643 (1991) (plurality); *Medina* v. *California*, 120 L. Ed. 2d 353, 363, 112 S. Ct. 2572, 2577 (1992).

Amicus CJLF's position in the present case is much narrower than Justice Scalia's thesis. We assert only that when a rule's constitutional stature is premised squarely on tradition, as *Winship* is, that the boundary of the constitutional rule extends no farther than the boundary of the traditional rule. Any practice which traditionally coexisted with the rule in question, therefore, is not a violation of the rule.

Acceptance of this principle would provide better guidance to lower courts than the piecemeal approach that has characterized the post-*Winship* cases to date. Cf. *McMillan* v. *Pennsylvania*, 477 U. S. 79, 91 (1986) (noting "inability to lay down any 'bright line' test"). If the *Sandstrom* cases are preserved as a separate body of law under *stare decisis*, regardless of their original correctness, this approach would not significantly diminish protections for the accused, because *Winship* has not been used successfully to attack traditional practice in other cases.

With *Winship* thus limited, legislatures would have a pole star to navigate by as they deal with difficult questions of

burdens of proof, rather than having to guess where the next case will come down in the "differences of degree" between *Mullaney* and *McMillan*. See *McMillan*, *supra*, 477 U. S., at 91. So long as they impose no greater burden on defendant than the common law, they will be safe.

The traditional basis for the determination of materiality by the judge is clear beyond question. The general principle that questions of law are for the court in criminal cases as well as civil was exhaustively discussed by the first Justice Harlan in his opinion for the Court in *Sparf* v. *United States*, 156 U. S. 51, 59-107 (1895). Cases applying this principle to the materiality of false statements are numerous. See, *e.g.*, *United States* v. *Singleton*, 54 F. 488, 489 (DC Ala. 1892); *Carroll* v. *United States*, 16 F. 2d 951, 953 (CA2 1927); *Luse* v. *United States*, 49 F. 2d 241, 245 (CA9 1931); *State* v. *Dineen*, 102 S. W. 480, 482 (Mo. 1907) ("well settled"); *People* v. *Threewit*, 96 N. E. 242, 243 (Ill. 1911) (error to submit question to jury). That should be the end of the *Winship* question.

III. The Sixth Amendment should not be extended to strike down traditional practice without exceptionally compelling justification, not present here.

A. Traditional Practice and the Sixth Amendment.

"As this Court has often recognized, it was not the purpose or effect of § 2 of Article 3, read in the light of the common law, to enlarge the then existing right to a jury trial. The object was to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law and in all cases of a like nature as they might arise in the future, [citation], but not to bring within the sweep of the guaranty those cases in which it was then well understood that a jury trial could not be demanded as of right.

"The Fifth and Sixth Amendments, while guaranteeing the continuance of certain incidents of trial by jury which Article 3, § 2, had left unmentioned, did not enlarge the right to jury trial as it had been established by that Article." *Ex parte Quirin*, 317 U. S. 1, 39 (1942); see also *Parklane Hosiery*

Co. v. *Shore*, 439 U. S. 322, 333 (1979) (civil cases, Seventh Amendment).

This theme resounds throughout this Court's decisions on the constitutional right to jury trial. The several provisions of the Constitution on this subject are "conservative" in the true sense of the word. These provisions were intended to preserve an existing right against future encroachment, in contrast to, for example, the Equal Protection Clause, which worked an affirmative change in the law. See *Holland* v. *Illinois*, 493 U. S. 474, 478-479 (1990) (prohibition of racial discrimination comes from Equal Protection Clause, not Sixth Amendment).

In accordance with this principle, this Court has consistently held that a jury trial for a petty offense is not within the scope of the constitutional right precisely because it was not within the scope of the common law right. See *Schick* v. *United States*, 195 U. S. 65, 69-70 (1904).

In only one type of case has this Court found that a defendant was constitutionally entitled to have a jury determine a question which judges determined at common law. *Bloom* v. *Illinois*, 391 U. S. 194, 198-200 (1968) extended the constitutional guaranty of jury trial to criminal contempt cases where the punishment exceeded the petty offense level, despite a long line of contrary authority. See *id.*, at 195-196.

Such a departure could only be justified by compelling reasons, and the reasons are plain enough. There is great potential for tyranny in a proceeding initiated, prosecuted, and tried by a single judge. When all this is done by the same judge whose authority was defied, it comes perilously close to the judge having an interest in the action. Cf. *Tumey* v. *Ohio*, 273 U. S. 510, 535 (1927); see also Advisory Committee Note to Federal Rule of Criminal Procedure 42(b), para. 4.

These dangers have long been apparent. Blackstone noted that the manner of trying contempts was "not agreeable to the genius of the common law in any other instance." 4 W. Blackstone, Commentaries 284 (1st ed. 1769). In *Bushell's Case*, 124 Eng. Rep. 1006, 1010 (CP 1670), the potential for abuse in a contempt proceeding was held to justify the extraordinary remedy of *de novo* review on habeas corpus, a proceeding

completely unavailable to persons accused of felony or treason, who had the benefit of trial by jury.

There are no dangers of comparable weight to justify overturning traditional practice in the present case with a blanket constitutional mandate. There may be particular false statement laws where materiality is properly considered a factual question for the jury. In the absence of an express statutory directive either way, this may be a proper decision for courts to make. The problem with the opinion below is its implication that the result is constitutionally required, leaving contrary state practices in doubt. See App. to Pet. for Cert. 9a-10a, n. 2.

To follow the course of *Bloom* and hold that, throughout the Nation, juries must now decide questions that judges have decided for centuries, there should be a showing that something is fundamentally unjust about having judges make these decisions. Yet the entire institution of jury trial was not considered "fundamental to ordered liberty" when that was the test of incorporation in the Fourteenth Amendment. See *Duncan* v. *Louisiana*, 391 U. S. 145, 185 (1968) (Harlan, J., dissenting). Close on the heels of the *Winship* decision, this Court rejected a requirement for juries in juvenile cases, in part because it did not believe that juries would actually be better fact-finders. *McKeiver* v. *Pennsylvania*, 403 U. S. 528, 547 (1971) (plurality); *id.*, at 551 (White, J., concurring).

The court below says that juries are capable of making materiality determinations. App. to Pet. for Cert. 14a. That may well be true, but it does not follow that judges are not capable or that determination by judges is unfair. Compelling reasons for overthrowing a centuries-old practice have not been shown.

B. Sullivan v. Louisiana.

The court below placed great reliance on *Sullivan* v. *Louisiana*, 124 L. Ed. 2d 182, 113 S. Ct. 2078 (1993), but that case does not alter the scope of the right to jury trial. *Sullivan* involved a clear case of *Winship* error. The burden of proof instruction given to the jury was not "reasonable doubt" as that term is generally understood in American jurisprudence. The

doubt at issue in Sullivan's trial was the quintessential question of fact: who did it? *Id.*, at 187, 113 S. Ct., at 2080.

The Sixth Amendment only entered the case on the question of harmless error analysis. The Court held that an appellate court cannot say that the jury would have found the facts proven by the required standard had they been so instructed, for then the defendant would have been found guilty by the wrong entity. *Id.*, at 190, 113 S. Ct., at 2082. *Sullivan* says nothing about which elements must be submitted to the jury *at trial*, because the elements in question in that case were clearly for the jury.

C. Sinclair as Precedent.

The majority opinion in the Court of Appeals acknowledged that *Sinclair* v. *United States*, 279 U. S. 263 (1929) is a precedent of a higher court on point, and then proceeded to decide whether this precedent survives later cases, which are not on point. App. to Pet. for Cert. 6a. There are two problems with this approach, one involving the hierarchy of courts, the other involving the nature of precedent.

The first point is straightforward. "Needless to say, only this Court may overrule one of its precedents. Until that occurs, [*Sinclair*] is the law, and the decision below cannot be reconciled with it." *Thurston Motor Lines, Inc.* v. *Jordan K. Rand Ltd.*, 460 U. S. 533, 535 (1983).

The second point is equally fundamental. "We take it to be a sound principle, that no proposition of law can be said to be overruled by a court, which was not in the mind of that court when the decision was made." *Woodruff* v. *Parham*, 8 Wall. (75 U. S.) 123, 138 (1869). *Sinclair* was a case about who decides which issues at trial, the judge or the jury. It could only be overruled in a case where that question was "in the mind of the court," not merely by facial inconsistency with general statements in cases dealing with other issues.

Winship was a case about the burden of proof employed by a judge sitting without a jury. Identity of the decision maker was not at all a factor in the case. *Sullivan* is not on point for the reasons discussed *ante*, at 15-16. *Cabana* v. *Bullock*, 474 U. S. 376, 384-385 (1986) involved a finding of fact which was not an element of the offense at all, and thus passing mention of the

requirement that juries find the elements is a pure example of an *obiter dictum*, and a disapproved dictum at that. See *Pope* v. *Illinois*, 481 U. S. 497, 503, n. 7 (1987).

By paying too much attention to dicta, the Court of Appeals majority fell into an old, well-known trap. As Chief Justice Marshall noted long ago,

> "general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." *Cohens* v. *Virginia*, 6 Wheat. (19 U. S.) 264, 399-400 (1821).

That is why "[i]t is to the holdings of our cases, rather than their dicta, that we must attend . . . ." *Kokkonen* v. *Guardian Life Ins. Co. of America*, 128 L. Ed. 2d 391, 396, 114 S. Ct. 1673, 1676 (1994). The possibility that there may remain some elements to be determined by the trial judge in a jury trial was not "completely investigated" (or, indeed, investigated at all) by the cases cited by the Court of Appeals, because that question was not presented in any of them. It was not "in the mind of the court" in any of these cases, and a precedent on that point cannot have been overruled by them.

Sinclair was a federal case. The right to jury trial in federal courts was a constitutional right the day those courts were created. U. S. Const., Art. III, § 2, cl. 3. The application of that rule to the states can hardly alter *Sinclair*'s status as precedent. Similarly, proof beyond a reasonable doubt was a well-known requirement at the time of *Sinclair*, see *In re Winship*, 397 U. S. 358, 362 (1970) and cases cited, so the subsequent constitutionalization of that requirement made no change in the rules governing federal courts. If the *Sinclair* rule coexisted with both rights in 1929, no change in the law since then prevents them from coexisting now.

Amicus CJLF takes no position on whether this Court should follow *Sinclair* or overrule it under its general supervisory power over federal courts. What we do object to is the wresting of yet one more decision from the realm of legislative control and state-by-state development in the absence of any compelling reason for such a step. The federalization and constitutionalization of criminal procedure have gone too far already. In this case, at least, they should go no further.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed.

February, 1995

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

Supreme Court, U.S.
FILED
MAR 22 1995
OFFICE OF THE CLERK

No. 94-514

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA,

Petitioner,

vs.

MICHAEL E. GAUDIN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

BEVERLY A. POHL
Suite 200
350 Southeast Second Street
Fort Lauderdale, FL 33301
(305) 767-8909

BRUCE S. ROGOW*
BRUCE S. ROGOW, P.A.
2441 S.W. 28th Avenue
Fort Lauderdale, FL 33312
(305) 767-8909

** Counsel of Record for Amicus Curiae National Association of Criminal Defense Lawyers*

19 pp

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

Interest of *Amicus Curiae* 1

Summary of Argument 2

Argument 3

I. Neither *Sinclair, Kungys* nor history provides an adequate rationale for treating the materiality element of 18 U.S.C. § 1001 as a matter of law outside the jury's purview. 3

II. Correcting the misuse of *Kungys* and *Sinclair* will serve the administration of justice. 12

Conclusion 15

TABLE OF CITATIONS

Cases Cited:

Argersinger v. Hamlin, 407 U.S. 25 (1972) 14

Glasser v. United States, 315 U.S. 60 (1942) 13

Hurtado v. California, 110 U.S. 516 (1884) 10

In re Winship, 397 U.S. 358 (1970) 3, 5, 8, 9, 13, 14, 15

Jackson v. Virginia, 443 U.S. 307 (1979) 13

Kungys v. United States, 485 U.S. 759 (1988) ...2, 3, 6, 7, 8, 9, 10, 12

Contents

Page

Miller v. Fenton, 474 U.S. 104 (1985) 4

Morissette v. United States, 342 U.S. 246 (1951) 9

Sandstrom v. Montana, 442 U.S. 510 (1979) 9

Sinclair v. United States, 279 U.S. 263 (1929) .....
.....2, 3, 5, 6, 7, 8, 9, 12, 15

United States v. Abadi, 706 F.2d 178 (6th Cir. 1983) 8

United States v. Beuttenmuller, 29 F.3d 973 (5th Cir. 1994)
..... 13

United States v. Brantley, 786 F.2d 1322 (7th Cir.), *cert. denied*, 477 U.S. 908 (1986) 9

United States v. Evans, 42 F.3d 586 (10th Cir. 1994) 13

United States v. Gaudin, 28 F.3d 943 (9th Cir. 1994) ...2, 3, 9, 12, 13

United States v. Gribben, 984 F.2d 47 (2d Cir. 1992), *reversing*, 792 F. Supp. 960 (S.D.N.Y. 1992) 9

United States v. Staniforth, 971 F.2d 1355 (7th Cir. 1992) ... 5

Victor v. Nebraska, __ U.S. __, 114 S. Ct. 1239 (1994) ... 5

Statutes Cited:

2 U.S.C. § 192 6

Contents

Page

8 U.S.C. § 1101(f))6) 8

18 U.S.C. § 1001 .....2, 3, 5, 6, 8

28 U.S.C. § 2254 4

Other Authorities Cited:

Kenneth M. Miller, *Materiality: An Element of 18 U.S.C. § 1001 and a Question for the Jury,* 23 Loy. L.A. L. Rev. 989 (1990) 7

Gertrude Stein, *Everybody's Autobiography* 289 (1st ed. 1937) 6

Department of Justice Manual Vol. 9 § 9-42.143 (Prentice-Hall Law & Business 1989-2 Supp.) 5

No. 94-514

In The

Supreme Court of the United States

October Term, 1994

UNITED STATES OF AMERICA,

Petitioner,

vs.

MICHAEL E. GAUDIN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit corporation with a membership of more than 8,600 attorneys and 28,000 affiliate members, including representatives from all fifty states. The

1. The parties have consented to the filing of this Brief. Their letters of consent have been filed with the Clerk.

American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in the House of Delegates.

The NACDL was founded over twenty-five years ago to promote study and research in the field of criminal defense law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage integrity, independence and expertise of defense lawyers. Among the NACDL's stated objectives is the promotion of the proper administration of justice. Thus, the members of the NACDL have a vital interest in insuring that the integrity of the federal and state systems of criminal justice are protected. This includes an interest in this case, which presents an opportunity to correct a long-standing but flawed legal construct of criminal materiality under 18 U.S.C. § 1001, and to reformulate a new rule that materiality is a factual matter for the jury, consonant with contemporary case law and Fifth Amendment guarantees.

SUMMARY OF ARGUMENT

In a false statement prosecution under 18 U.S.C. § 1001, the generally accepted view that the sufficiency of the evidence to prove the element of "materiality" is a matter of law for the court's determination, rather than a matter of fact for the jury, is an unsupportable proposition which the Court of Appeals for the Ninth Circuit correctly rejected. *United States v. Gaudin*, 28 F.3d 943 (9th Cir. 1994) (*en banc*). Neither the traditional authority for treating materiality as a legal issue, *Sinclair v. United States*, 279 U.S. 263 (1929), nor the "reaffirmation" of that case in *Kungys v. United States*, 485 U.S. 759 (1988), contains any analysis or constitutional justification for a court to determine an essential element of a crime and to decide disputed facts at trial adversely to a criminal defendant. Extending the "materiality is a matter of law" rule from those cases to permit a judge to weigh disputed

evidence and to direct a government verdict on a disputed element of the crime under § 1001 is a misapplication of law. The rule the government relies upon conflicts with the due process guarantees articulated in *In re Winship*, 397 U.S. 358 (1970), and violates a defendant's right to a jury trial on all elements of the crime.

If conventional wisdom is flawed, it must be discarded. Questions of retroactivity and of the application of a new rule to other crimes containing a materiality element are simply questions for another day. *Gaudin* was correctly decided below and should be affirmed.

ARGUMENT

I.

NEITHER *SINCLAIR, KUNGYS* NOR HISTORY PROVIDES AN ADEQUATE RATIONALE FOR TREATING THE MATERIALITY ELEMENT OF 18 U.S.C. § 1001 AS A MATTER OF LAW OUTSIDE THE JURY'S PURVIEW.

The question presented in the government's petition for certiorari adroitly avoids confronting whether the "materiality" element of 18 U.S.C. § 1001 is a matter of law or fact.[2] The government asks whether materiality is "an *issue* to be decided by the court rather than the jury." (emphasis supplied). It is beyond dispute that factual issues must be decided by the jury, and it is uncontroverted that actual issues of law are properly determined by a court. Thus, a precise characterization of "materiality" — is it a matter of fact or law — should decide this

2. The government's Brief does not dispute the majority view of the circuit courts of appeals that materiality is an element of the crime under § 1001, and refers to "the materiality element." (Pet. Br. p. 12).

case *a fortiori*. The Court has recognized the difficulty in drawing the "elusive" fact/law distinction:

> [T]he Court has yet to arrive at "a rule or principle that will unerringly distinguish a factual finding from a legal conclusion." *Pullman-Standard v. Swint*, 456 U.S. 273, 288, 102 S.Ct. 1781, 1789, 72 L.Ed.2d 66 (1982).
>
> Perhaps much of the difficulty in this area stems from the practical truth that the decision to label an issue a "question of law," a "question of fact," or a "mixed question of law and fact" is sometimes as much a matter of allocation as it is of analysis. *See* Monaghan, *Constitutional Fact Review*, 85 Colum.L.Rev. 229, 237 (1985). At least in those instances in which Congress has not spoken and in which the issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.

Miller v. Fenton, 474 U.S. 104, 112, 113-114 (1985).[3] In a criminal trial in which "materiality" is an element of the crime and is disputed, materiality is a question of fact for the jury.

---

3. *Fenton* did not implicate the judge-or-jury dilemma, but considered whether, in a 28 U.S.C. § 2254 habeas corpus proceeding, a district court's conclusion about the voluntariness of confession was a question of fact entitled to presumption of correctness, deciding that it was not. 474 U.S. at 112.

The government's position is essentially that historical practice and two cases from this Court establish that a judge is the proper judicial actor to determine materiality in a § 1001 case. The government makes that argument *despite* materiality being an acknowledged element of the crime under § 1001, and *despite* the fact that materiality was disputed in this case and was dependent upon testimonial proof. In failing to credit those indicia of a factual matter, the government sidesteps *In re Winship*, 397 U.S. 358 (1970), which requires that "[t]he government must prove beyond a reasonable doubt every element of a charged offense. *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)." *Victor v. Nebraska*, __ U.S. __, 114 S. Ct. 1239, 1242 (1994).

Merely by labeling materiality a matter of law, courts have justified their curious withdrawal of materiality from the jury. Years of repetition cannot convert a faulty premise into a sound one. Judge Posner has called that course "more than a little puzzling . . . ." *United States v. Staniforth*, 971 F.2d 1355, 1358 (7th Cir. 1992). Where materiality is a disputed issue in a false statement prosecution, the matter-of-law mantra must be rejected in favor of a principled adherence to the *In re Winship*, 397 U.S. 358 (1970), promise that all disputed facts in a criminal prosecution will be determined by a jury and based upon proof beyond a reasonable doubt.[4]

Neither *Sinclair v. United States*, 279 U.S. 263 (1929), nor

4. The government's assertion that "[t]he holding of *Winship* has no direct application in this case" because "*Winship* did not address the standards for distinguishing questions of law from issues of fact," (Pet. Br. 32), serves to bolster respondent's position that once one acknowledges that materiality is determined *at trial* after a factual showing, it must, under *Winship*, be submitted to the jury with the other elements of the crime. *See Department of Justice Manual* Vol. 9 § 9-42.143 (Prentice-Hall Law & Business 1989-2 Supp.) ("Materiality [in an 18 U.S.C. § 1001 prosecution] is best shown by the testimony of expert witnesses. . . ").

Kungys v. United States, 485 U.S. 759 (1988), can survive an analytically honest assessment of their statements that materiality is a matter of law. In *Sinclair,* this Court affirmed a conviction under 2 U.S.C. § 192, for Sinclair's refusal to answer any question "pertinent" to an inquiry conducted by a House of Congress. Sinclair claimed that the question asked was not "pertinent," but the Court approved the trial court's finding that the *question* was pertinent as a matter of law:

> The question of pertinency under § 102 was rightly decided by the court as one of law. *It did not depend upon the probative value of evidence.* That question may be likened to those concerning *relevancy* at the trial of issues in court, and it is not essentially different from the question as to materiality of false testimony charged as perjury in prosecutions for that crime. Upon reasons so well known that their repetition is unnecessary it is uniformly held that relevancy is a question of law . . . *And the materiality of what is falsely sworn, when an element in the crime of perjury, is one for the court.*

279 U.S. at 298 (emphasis supplied). The final quoted sentence, clearly dictum in *Sinclair,* has been the legal justification for hundreds of subsequent judicial utterances that materiality in a §1001 prosecution is a matter for the judge. But when the materiality of false statements is contested and *is* dependent upon the probative value of the government's evidence — as in this case — "there's no there there" in *Sinclair.*[5]

5. Gertrude Stein, *Everybody's Autobiography* 289 (1st ed. 1937) (commenting on Oakland, California).

Questions are classically reviewed by a judge for relevance; answers pose a different question. One commentator has aptly stated the "*Sinclair* rule" to be based on a misunderstanding of the difference between materiality and relevance:

> The concept of "relevancy" concerns the admissibility of evidence. Conversely, materiality as an element of an offense is an issue upon which guilt or innocence depends. As the court stated in *United States v. Taylor,* [693 F. Supp. 828 (N.D. Cal. 1988)] "A ruling by the court regarding evidence simply determines what information a jury may consider in reaching its decision regarding the elements of an offense; a ruling by the court regarding materiality precludes the jury from ever reaching a decision regarding that element." The concepts of materiality and relevancy should be viewed as distinct. Therefore, comparing materiality to relevancy does not firmly support the rule that materiality is a question of law.

Kenneth M. Miller, *Materiality: An Element of 18 U.S.C. § 1001 and a Question for the Jury,* 23 Loy. L.A. L. Rev. 989, 1017 (1990) (citations omitted).

Clearly, the *Sinclair* Court did not consider the effect of its dictum as applied to cases where the probative weight of a statement, *i.e.,* the materiality, is an element of a crime. Unfortunately, neither did the Court in *Kungys v. United States,* 485 U.S. 759 (1988), when it once again "reaffirmed" the *Sinclair* dictum.

Kungys arose from a determination by a district court in a

civil, non-jury denaturalization case, that certain false statements in a visa and naturalization petition were *not* material under 8 U.S.C. § 1101(f)(6) and § 1451(a). 485 U.S. at 764-766. After first re-formulating the test for materiality in the denaturalization context ("whether [the concealments or misrepresentations] had a natural tendency to influence the decisions of the Immigration and Naturalization Service"), the Court "follow[ed] what has been done with the materiality requirement under other statutes dealing with misrepresentations to public officers" and considered materiality to be a question of law, and thus appropriate for appellate *de novo* review under the new test. *Id.* at 772. The Court cited *Sinclair* and a § 1001 case, *United States v. Abadi,* 706 F.2d 178 (6th Cir. 1983), in support of its conclusion that materiality was a matter of law. 485 U.S. at 772. However, *Abadi* decided that materiality should not be treated as an element of § 1001, but rather as a "judicially imposed limitation to insure the reasonable application of the statute." 706 F.2d at 180 n. 2. Thus, the *Abadi* court reasoned, the *Winship*-imposed beyond a reasonable doubt standard of proof was not required. *Id.* This Court's citation to *Abadi* did not discuss or endorse that reasoning.

In *Kungys,* a non-jury civil case, it was not necessary for the Court to consider whether the fact/law distinction, as applied to the element of materiality, implicated due process considerations under *Winship. Kungys* simply did not present the question framed in this case: may a district court judge, rather than a jury, decide the essential statutory element of materiality adversely to a criminal defendant, and direct a verdict against the defendant on that discrete element of the crime? The fact/law distinction in a false statement criminal case cannot comfortably rest upon decades, or even centuries of decisions which found materiality to be "law," but which overlooked the reality that it is an element of the crime based on the facts adduced at trial.[6]

6. Even Judge Kozinski, dissenting from the *en banc* majority in the (Cont'd)

In the criminal arena, a district court's finding that a false statement was *not* material and the resulting dismissal of a prosecution would be a matter of law. *See United States v. Gribben*, 984 F.2d 47 (2d Cir. 1992), *reversing*, 792 F. Supp. 960 (S.D.N.Y. 1992). Judges daily make decisions that charges or proof are *insufficient* to sustain a criminal conviction. But once evidence is presented to a jury, and once that jury is instructed as to the elements of the crime, the judge's legal rulings concerning the admitted evidence cannot usurp the jury's role. This Court has refused to tolerate any other instance in which an instruction or ruling usurps the jury's exclusive factfinding function, regardless of the weight of the evidence underlying such a ruling. *See Sandstrom v. Montana*, 442 U.S. 510 (1979) (reversible error if the trial court directs a verdict on an essential element of a crime by giving an instruction that there is a conclusive presumption as to that element).[7]

Legal reasoning which has been accepted over time is not insulated from later critical analysis. Our law is not immutable

---

(Cont'd)

court below, acknowledged that "[t]he continued vitality of *Sinclair* is subject to legitimate question because it antedated the Court's *Winship* line of cases." 28 F.3d at 956 (Kozinski, J., dissenting). Judge Kozinski's minority view that *Sinclair* "was given new life" in the "compelling authority" of *Kungys*' finding that a finding of *non*-materiality was a question of law still begs the question of whether a court may constitutionally weigh evidence and direct a finding adverse to a criminal defendant on an element of a crime.

7. Those lower courts which justify deciding a criminal materiality element as an "exception" to the *Winship* rule do so without constitutional authority, but only on the shirttails of *Sinclair*. *See, e.g., United States v. Brantley*, 786 F.2d 1322 (7th Cir.), *cert. denied*, 477 U.S. 908 (1986). When presented with the issue head-on, this Court has been unwilling to tolerate mandatory presumptions of proof of criminal elements, *Morissette v. United States*, 342 U.S. 246, 274 (1951), and should be equally adverse to an "exception" to the *Winship* rule.

like that of the Medes and the Persians.[8] Where flaws are revealed after years of use, the *Sinclair* statement, admittedly repeated in *Kungys*, should be revisited and discarded.

This Court has never been reticent about reviewing past decisions which are later demonstrated to be faulty, erroneous or outdated.[9] This, too, is such a case.

---

8. Daniel 6:12; *see also Hurtado v. California*, 110 U.S. 516, 529 (1884) ("It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians.").

9. *See Nichols v. United States*, 114 S. Ct. 1921 (1994), *overruling Baldasar v. Illinois*, 446 U.S. 222 (1980); *United States v. Dixon*, 113 S. Ct. 2849 (1993), *overruling Grady v. Corbin*, 495 U.S. 508 (1990); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992), *overruling Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Keeney v. Tamayo- Reyes*, 504 U.S. 1 (1992), *overruling Townsend v. Sain*, 372 U.S. 293 (1963); *Payne v. Tennessee*, 501 U.S. 808 (1991), *overruling Booth v. Maryland*, 482 U.S. 496 (1987); *Collins v. Youngblood*, 497 U.S. 37 (1990), *overruling Kring v. Missouri*, 107 U.S. 221 (1883), and *Thompson v. Utah*, 170 U.S. 343 (1898); *Alabama v. Smith*, 490 U.S. 794 (1989), *overruling Simpson v. Rice* (decided with *North Carolina v. Pearce*), 395 U.S. 711 (1969); *Thornburgh v. Abbott*, 490 U.S. 401 (1989), *overruling Procunier v. Martinez*, 416 U.S. 396 (1974); *Rodriguez De Quijas v. Shearson/ American Exp., Inc.*, 490 U.S. 477 (1989), *overruling Wilko v. Swan*, 346 U.S. 427 (1953); *South Carolina v. Baker*, 485 U.S. 505 (1988), *overruling Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895); *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988), *overruling Enelow v. New York Life Ins. Co.*, 293 U.S. 379 (1935); *Solorio v. United States*, 483 U.S. 435 (1987), *overruling O'Callahan v. Parker*, 395 U.S. 258 (1969); *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468 (1987), *overruling Parden v. Terminal Railway of Ala. Docks Dept.*, 377 U.S. 184 (1964); *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U.S. 232 (1987), *overruling General Motors Corp. v. Washington*, 377 U.S. 436 (1964); *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986), *overruling August v. Bronstein*, 417 U.S. 901 (1974); *Batson v. Kentucky*, 476 U.S. 79 (1986), *overruling Swain v. Alabama*, 380 U.S. 202 (1965); *Daniels v.*

(Cont'd)

(Cont'd)

Williams, 474 U.S. 327 (1986), *overruling Parratt v. Taylor*, 451 U.S. 527 (1981); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), *overruling National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruling Maryland v. Wirtz*, 392 U.S. 183 (1968); *Copperweld Corp. Independence Tube Corp.*, 467 U.S. 752 (1984), *overruling United States v. Yellow Cab Co.*, 332 U.S. 218 (1947); *United States v. Ross*, 456 U.S. 798 (1982), *overruling Robbins v. California*, 453 U.S. 420 (1981); *United States v. Salvucci*, 448 U.S. 83 (1980), *overruling Jones v. United States*, 362 U.S. 257 (1960); *Hughes v. Oklahoma*, 441 U.S. 322 (1979), *overruling Geer v. Connecticut*, 161 U.S. 519 (1896); *United States v. Scott*, 437 U.S. 82 (1978), *overruling United States v. Jenkins*, 420 U.S. 358 (1975); *Monell v. New York City Dept. of Social Serv.*, 436 U.S. 658 (1978), *overruling Monroe v. Pape*, 365 U.S. 167 (1961); *Department of Revenue of State of Wash. v. Association of Washington Stevedoring Companies*, 435 U.S. 734 (1978), *overruling Puget Sound Stevedoring Co. v. State Tax Comm'n*, 302 U.S. 90 (1937); *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), *overruling United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), *overruling Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951); *Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977), *overruling Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973); *City of New Orleans v. Dukes*, 427 U.S. 297 (1976), *overruling Morey v. Doud*, 354 U.S. 457 (1957); *Lodge 76, Intern. Ass'n of Machinists and Aerospace Workers, AFL CIO v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976), *overruling Int'l Union Automobile Workers v. Wisconsin Empl. Relations Board*, 336 U.S. 245 (1949); *Dove v. United States*, 423 U.S. 325 (1976), *overruling Durham v. United States*, 401 U.S. 481 (1971); *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973), *overruling Liggett Co. v. Baldridge*, 278 U.S. 105 (1928); *Andrews v. Louisville & N. R. Co.*, 406 U.S. 320 (1972), *overruling Moore v. Illinois Central R. Co.*, 312 U.S. 630 (1941); *Perez v. Campbell*, 402 U.S. 637 (1971), *overruling Kesler v. Department of Pub. Safety*, 369 U.S. 153 (1962); *Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235 (1970), *overruling Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962); *Benton v. Maryland*, 395 U.S. 784 (1969), *overruling Palko v. Connecticut*, 302 U.S. 319 (1937); *Lear, Inc. v. Adkins*, 395 U.S. 653 (1969), *overruling Automatic Radio Co. v. Hazeltine Research, Inc.*, 339 U.S. 827 (1950); *Brandenburg v. Ohio*, 395 U.S. 444 (1969), *overruling Whitney v. California*, 274 U.S. 357 (1927);

(Cont'd)

II.

CORRECTING THE MISUSE OF *KUNGYS* AND *SINCLAIR* WILL SERVE THE ADMINISTRATION OF JUSTICE.

Ironically, the materiality-as-a-matter-of-fact rule which *amicus* urges could serve both the government's and future defendants' purposes. Since under the *Sinclair* rule materiality is usually found in the government's favor as a matter of law, one can fairly assume that in the ordinary case proof of that element will not be difficult for the government to establish. Even under the Ninth Circuit's *Gaudin* rule, in the majority of prosecutions the government would have no difficulty at trial proving materiality beyond a reasonable doubt. But where materiality was genuinely at issue, a defendant would have the

---

(Cont'd)

Moore v. Ogilvie, 394 U.S. 814 (1969), *overruling MacDougall v. Green*, 335 U.S. 281 (1948); *Peyton v. Rowe*, 391 U.S. 54 (1968), *overruling McNally v. Hill*, 293 U.S. 131 (1934); *Carafas v. LaVallee*, 391 U.S. 234 (1968), *overruling Parker v. Ellis*, 362 U.S. 574 (1960); *Bruton v. United States*, 391 U.S. 123 (1968), *overruling Delli Paoli v. United States*, 352 U.S. 232 (1957); *Marchetti v. United States*, 390 U.S. 39 (1968), *overruling United States v. Kahriger*, 345 U.S. 22 (1953), and *Lewis v. United States*, 348 U.S. 419 (1955); *Afroyim v. Rusk*, 387 U.S. 253 (1967), *overruling Perez v. Brownell*, 356 U.S. 44 (1958); *Spevack v. Klein*, 385 U.S. 511 (1967), overruling *Cohen v. Hurley*, 366 U.S. 117 (1961); *Harris v. United States*, 382 U.S. 162 (1965), *overruling Brown v. United States*, 359 U.S. 41 (1959); *Swift & Co. v. Wickham*, 382 U.S. 111 (1965), *overruling in part Kesler v. Department of Public Safety*, 369 U.S. 153 (1962); *Pointer v. Texas*, 380 U.S. 400 (1965), *overruling West v. Louisiana*, 194 U.S. 258 (1904); *Gideon v. Wainwright*, 372 U.S. 335 (1963), *overruling Betts v. Brady*, 316 U.S. 455 (1942); *Fay v. Noia*, 372 U.S. 391 (1963), *overruling Darr v. Burford*, 339 U.S. 200 (1950); *Mapp v. Ohio*, 367 U.S. 643 (1961), *overruling Wolf v. Colorado*, 338 U.S. 25 (1949); *James v. United States*, 366 U.S. 213 (1961), *overruling Commissioner of Internal Revenue v. Wilcox*, 327 U.S. 404 (1946); *Brown v. Board of Educ.*, 347 U.S. 483 (1954), *overruling Plessy v. Ferguson*, 163 U.S. 537 (1894).

constitutionally warranted benefit of having the jury evaluate the government's proof of that element of the crime. However, if the jury returned a verdict of guilty, the government would then have the benefit on appeal of the more deferential standard of review of the sufficiency of the evidence. A conviction will be sustained if a rational jury could have found that each element of the crime was established beyond a reasonable doubt. *See Jackson v. Virginia,* 443 U.S. 307, 317-20 (1979). The evidence will be viewed in the light most favorable to the government, giving the government the benefit of all reasonable inferences and credibility choices. *Glasser v. United States,* 315 U.S. 60, 80 (1942).[10] One wonders why the government works so hard here to uphold the *Sinclair* rule; probably it is because the rule serves to permit "materiality" findings, and thus convictions, which a jury might not countenance.

The *Winship/Gaudin* approach to materiality, reserved for those instances in which materiality is an element of the crime, truly serves the fair administration of justice. Judge Kozinski, dissenting below, proffered the spectre of "scores, perhaps, hundreds of prisoners" seeking the benefit of the new rule *via* appellate review and/or collateral proceedings. 28 F.3d at 955 (Kozinski, J., dissenting). That concern is speculative; the complex factors which are relevant to retroactivity and the applicability of assigning materiality to the jury in different statutory contexts are not questions presented in this case. In any event, constitutional standards are not displaced by fears about their future consequences. Even where such concerns are well-founded, optimism guides the course of constitutional history:

---

10. Under the present system, a legal determination of materiality is reviewed *de novo. See, e.g., United States v. Evans,* 42 F.3d 586, 592 (10th Cir. 1994); *United States v. Beuttenmuller,* 29 F.3d 973, 982 (5th Cir. 1994) ("While materiality rests upon a factual evidentiary showing by the prosecution, the actual determination of materiality is a question of law for the court, and as such, it is reviewed de novo.")

> The holding of the Court today may well add large new burdens on a profession already overtaxed, but the dynamics of the profession have a way of rising to the burdens placed on it.

Argersinger v. Hamlin, 407 U.S. 25, 44 (1972) (Burger, C.J., concurring). The dynamics of our system can accomodate whatever consequences may flow from following *Winship*.

CONCLUSION

In an 18 U.S.C. § 1001 prosecution, "materiality" is an essential element of the offense. It must therefore be submitted to the jury and be subject to the *In re Winship* requirement of proof beyond a reasonable doubt. *Amicus Curiae* the National Association Criminal Defense Lawyers urges this Court to limit the *Sinclair* materiality rule to judicial rulings that a false statement is *not* material; to recognize that, at trial, materiality is a question of fact; and to affirm the constitutionally correct decision of the *en banc* Ninth Circuit Court of Appeals.

Respectfully submitted,

BRUCE S. ROGOW*
BRUCE S. ROGOW, P.A.
2441 S.W. 28th Avenue
Fort Lauderdale, Florida 33312
(305) 767-8909
and
BEVERLY A. POHL
Suite 200
350 Southeast Second Street
Fort Lauderdale, Florida 33301
(305) 767-8909

**Counsel of Record for Amicus Curiae National Association of Criminal Defense Lawyers*